

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----X  
GONZALO CORTES,

4 Plaintiff,

5 versus

14 CV 3014 (LDH)

6 CITY OF NEW YORK; SERGEANT JONCRIS  
RZONCA, Shield No. 2960; POLICE OFFICER  
7 MATTHEW SMITH, Shield No. 9407; POLICE  
OFFICER CHRISTOPHER MUSA, Shield No.  
8 9064; POLICE OFFICER DOMINIC RUGGIERO,  
Shield No. 20894; POLICE OFFICER SHAUN  
9 RYAN, Shield No. 10960; POLICE OFFICER  
JOHN CESTARO, Shield No. 9553; POLICE  
10 OFFICER ANDREW SCHULZ, Shield No. 5758;  
SERGEANT STEPHEN DALY, Shield No. 944;  
11 POLICE OFFICER MARIO CAPPUCCIA, Shield  
No. 19046; SERGEANT PETER ROSESCHIN,  
12 Shield No. 3411; and JOHN and JANE DOE  
7 through 10, individual and in their  
13 official capacities (the names John and  
Jane Doe being fictitious, as the true  
14 names are presently unknown),

15 Defendants.

U.S. Courthouse  
Brooklyn, New York

16 -----X  
August 6, 2019  
11:00 a.m.

17  
18 Transcript of Civil Cause for Pretrial Conference

19 Before: HONORABLE LASHANN DEARCY HALL,  
District Court Judge

20  
21 APPEARANCES

22 Attorney for Plaintiff:  
ELEFTERAKIS, ELEFTERAKIS & PANEK  
23 80 Pine Street, 38th Floor  
New York, New York 10005  
24 BY: RAYMOND PANEK, ESQ.  
GABRIEL P. HARVIS, ESQ.  
25 BAREE N. FETT, ESQ.

MICHELE NARDONE, CSR -- Official Court Reporter

Cortes v. City of New York

Appearances (continuing):

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Office of the Corporation Counsel  
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MICHELE NARDONE, CSR -- Official Court Reporter

Cortes v. City of New York

1 (In open court.)

2 THE CLERK: All rise.

3 THE CLERK: Civil cause for pretrial conference,  
4 docket number 14 CV 3014, Cortes versus the City of New York.

5 Counsel, state your appearances, starting with the  
6 plaintiff.

7 MR. PANEK: For Plaintiff Gonzalo Cortes, Raymond  
8 Panek, by Elefterakis, Elefterakis & Panek, 80 Pine Street,  
9 New York. New York. Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. HARVIS: Gabriel Harvis, also of Elefterakis,  
12 Elefterakis & Panek, also for the plaintiff. Good morning,  
13 Your Honor.

14 THE COURT: Good morning.

15 MS. FETT: Good morning, Your Honor. Baree Fett, also  
16 for the plaintiff, from Elefterakis, Elefterakis & Panek.

17 THE COURT: Good morning.

18 THE CLERK: For the defense?

19 MS. RYAN: Good morning, Your Honor. Erin Ryan, on  
20 behalf of Officer Musa.

21 MS. GOYKADOSH: Brachah Goykadosh, also on behalf of  
22 Defendant Officer Musa. Good morning, Your Honor.

23 THE COURT: Good morning.

24 MS. JACOBS: Elissa Jacobs, also on behalf of Sergeant  
25 Musa. We are all from Corporation Counsel. Good morning.

## Cortes v. City of New York

1 THE COURT: All right. You can all be seated. Good  
2 to see you all again. It's been a while.

3 I think we have a decent amount of ground to cover  
4 this morning. So we will try and march our way through as  
5 expeditiously as possible, but there are a number of issues  
6 that have lingered from the last premotion or pretrial  
7 conference -- excuse me -- as well as some new issues that have  
8 been raised in your most recent letters.

9 So, why don't we start with the lingering issues from  
10 the last pretrial conference. Now, you all submitted to the  
11 court letters on the 24th of January with respect to a couple  
12 of those issues, and one was with respect to the proposed  
13 language for an adverse inference. Notwithstanding my best  
14 hopes, it was not a joint submission.

15 So why don't we start with the plaintiffs. Your --  
16 wait a minute. Okay. I'm looking at your letter. The  
17 plaintiffs have proposed the following language: Two documents  
18 relevant to this case were lost: The Prisoner Pedigree Form  
19 and the Central Booking Medical Screening Form. I instruct you  
20 that you may conclude that the Prisoner Pedigree Form would  
21 have reflected that at the time of his arrest Mr. Cortes stated  
22 that he had no injuries and that no injuries were observed by  
23 the arresting officer. I further instruct you that you may  
24 conclude that the Central Booking Medical Screening Form would  
25 have reflected that at the time he arrived at central booking

## Cortes v. City of New York

1 Mr. Cortes reported that his shoulder was injured by an officer  
2 in the precinct while he was being taken to the bathroom.

3 The defense has suggested a far more streamlined  
4 approach. With respect to the Prisoner Pedigree Form, they  
5 propose: The Prisoner Pedigree Form would reflect that no  
6 injuries for Mr. Cortes were observed by the arresting officer;  
7 and, with respect to the Central Booking Medical Screening  
8 Form, they proposed that it states: The Central Booking  
9 Medical Screening Form would have reflected that Mr. Cortes  
10 stated that he was injured.

11 Let's start with the prisoner pedigree form. To the  
12 defense, I'm assuming you have reviewed the plaintiff's  
13 proposed language; and let's just limit the discussion right  
14 now only to the Prisoner Pedigree Form. Tell me your objection  
15 to the language as it's proposed by plaintiff.

16 MS. RYAN: Yes, Your Honor. So the pedigree form is  
17 filled out by the arresting officer. It would not have a  
18 portion for Mr. Cortes stating whether or not he had injuries.  
19 It would be based on the officer's observation of plaintiff  
20 standing at the desk. So to read in that plaintiff stated he  
21 had no injuries would not be proper for this form.

22 And that no injuries were observed by the arresting  
23 officer, the language the officer would use would be normal or  
24 apparently normal. We would be open to apparently uninjured,  
25 but it should be limited to the officer's point of view.

## Cortes v. City of New York

1 THE COURT: Well, normal or not normal is not part of  
2 the language you proposed, or apparently normal you don't  
3 suggest.

4 MS. RYAN: No. That's fine, Your Honor.

5 THE COURT: So it does sound to me -- and I will tell  
6 plaintiffs I did give some pause with respect to the language  
7 that you included regarding statements that Mr. Cortes may have  
8 stated. It didn't seem to me to be, as I recalled, what would  
9 have been or part of what would have been included.

10 MR. PANEK: Sure. So, Your Honor, part of what goes  
11 into these determinations, as we glean from the depositions, is  
12 that the officers don't just do a visual inspection but they  
13 ask about injuries, they ask about what the physical state is  
14 in coming to that conclusion of no injuries. If they are  
15 injured but they don't want medical attention, there is a  
16 conversation where they put injured, refused medical attention,  
17 et cetera.

18 So this is not just, you know, an eyeball scan, I  
19 don't see an injury. There is more interface with the officer,  
20 and at the scene there is an interface about whether or not,  
21 sir, are you injured, do you require medical assistance?

22 THE COURT: I understand, but the purpose of this  
23 exercise is not to kind of provide a fulsome explanation to the  
24 jury as to what goes on the form but rather to kind of replace  
25 what would have been on the form. So what I hear from you is

## Cortes v. City of New York

1 that you are saying, well, what would have informed the  
2 officer's notation would have been an inquiry of Mr. Cortes or  
3 whomever is under arrest, but what is documented is the finding  
4 or the determination; and that's what I think the sentence is  
5 saying.

6 MR. PANEK: Additionally, we don't know if that was  
7 documented on the form because it's been lost and we have never  
8 seen it, and now the defense wants to benefit from the fact  
9 that this has been lost. We don't know what's on the form.

10 THE COURT: That's the inference. I'm trying to  
11 remedy that by giving you the inference, that it would have  
12 said he had no injuries, but it's the inclusion of the  
13 additional language that he stated X, Y, Z that seems to go a  
14 step too far.

15 MR. PANEK: Okay. Then I think that's fine, Your  
16 Honor.

17 THE COURT: All right. So let's talk about the  
18 central booking form. Again, the plaintiffs propose: I  
19 further instruct you that you may conclude that Central Booking  
20 Medical Screening Form would have reflected that at the time he  
21 arrived at central booking Mr. Cortes reported that his  
22 shoulder was injured by a police officer in the precinct while  
23 he was being taken to the bathroom.

24 In this instance, it seems that the defense agrees  
25 that the document would have reflected statements by

## Cortes v. City of New York

1 Mr. Cortes, and you want to limit that to simply that he would  
2 have stated that he was injured as opposed to that he stated  
3 that he was injured by the police officer in the precinct while  
4 he was being taken in the bathroom.

5 MS. RYAN: Yes, Your Honor. We think that's a bit too  
6 far. Plaintiff would presumably, if he had complained, said,  
7 my shoulder hurts, but anything further, to say that plaintiff  
8 talked about the causation of that injury in this form.

9 MS. JACOBS: Your Honor, I mean, beyond that, I think,  
10 looking at the contemporaneous records where Mr. Cortes makes  
11 complaints, they are not that specific. He says five officers  
12 took him down or, you know, a number of different things to the  
13 doctors, to the EMTs. He does not state in any of those forms  
14 an officer, an officer injured me while I was going to the  
15 bathroom.

16 So, I think, to allow this kind of recreation is,  
17 again, when it's not reflected anywhere else in the  
18 contemporaneous records.

19 THE COURT: Give me an example of what he does say,  
20 because perhaps we can use that as our basis.

21 MR. PANEK: Your Honor, if I may, from the ambulance  
22 call report, Mr. Cortes reported, and I quote, Patient states  
23 that police department took him down when he went to the  
24 bathroom; and, when he went to the hospital he is more  
25 specific, and he says he was assaulted and thrown into bars by



## Cortes v. City of New York

1 an officer going to the bathroom. So my understanding --

2 THE COURT: Can I see that?

3 MR. PANEK: Oh, sure. May I approach, Your Honor?

4 THE COURT: Yes.

5 MR. PANEK: I just direct the court's attention to the  
6 narrative paragraph there.

7 THE COURT: I'm sorry. Remind me what am I looking  
8 at.

9 MR. PANEK: That is the ambulance call report from the  
10 actual precinct.

11 THE COURT: So the ambulance arrives at the precinct.  
12 He reports this to the EMTs?

13 MR. PANEK: In the precinct in front of police  
14 officers.

15 (Pause.)

16 THE COURT: Took him down is worse than injured when  
17 he went to the bathroom. I'm just saying.

18 MS. JACOBS: I understand what you are getting at,  
19 Your Honor, but, I think, to say that he would have reported  
20 exactly what they have now come to as their theory of the case.

21 THE COURT: Isn't that what he reports here to the  
22 EMT, which is their theory of the case?

23 MS. RYAN: Your Honor --

24 MR. PANEK: I also have, Your Honor, the Elmhurst  
25 Hospital record where he states, quote, The patient complains

## Cortes v. City of New York

1 of right shoulder pain from an altercation with NYPD.

2 THE COURT: May I have that?

3 MS. RYAN: Your Honor, I would ask that they also  
4 include the next page of that Elmhurst record, where he states  
5 he was pushed against the bars, which is different than being  
6 taken down. I think that's Ms. Jacobs' point, that the story  
7 has changed.

8 THE COURT: Right, but the language they used is, I  
9 think, far more innocuous than take down. They just said  
10 injured on the way to the bathroom.

11 I think what you all had objected to was the notion  
12 that he would have stated how the injury came about at all, and  
13 it seems that he quite consistently stated at least his version  
14 of how the injury came about. He does.

15 MS. JACOBS: He quite consistently says it was -- he  
16 was being injured by the NYPD.

17 THE COURT: While he was going to the bathroom, at  
18 least in one instance.

19 MS. JACOBS: Yes, at least in one instance, but not in  
20 all of them. The number of people changes. Exactly how it  
21 happened changed.

22 THE COURT: So if this language says he reported that  
23 his shoulder was injured by the police in the precinct when he  
24 was taken to the bathroom?

25 MR. PANEK: That's fine, Your Honor.

## Cortes v. City of New York

1 MS. JACOBS: Just one second, Your Honor.

2 (Pause.)

3 MS. RYAN: That would be fine with us, Your Honor.

4 THE COURT: He was injured by the police in the  
5 precinct when he was being taken to the bathroom. All right.  
6 Good.

7 I'm going to return this to you because, if not, I  
8 will lose it.

9 MR. PANEK: Thank you, Your Honor. Thank you.

10 THE COURT: All right. The SPRINT report. I would  
11 like to hear from the plaintiff first, and then I will hear  
12 from the defense on the SPRINT report.

13 MR. PANEK: First, to get it out of the way, with  
14 respect to statement one, as referred to in our letter, unknown  
15 condition, anonymous male caller asking for police location,  
16 difficult to hear, loud music playing in the background, line  
17 disconnects, the cell phone corroborates that call was made by  
18 the plaintiff. So we will concede.

19 To the extent that they claim that's a party  
20 admission, we have no objection to the statement attributable  
21 to Mr. Cortes, which is statement one, coming into evidence  
22 respond.

23 THE COURT: All right? So then the other two  
24 statements?

25 MR. PANEK: Statement two, I don't see any relevance

## Cortes v. City of New York

1 on it. We don't know who the caller is. We don't know what  
2 the substance of the call is. This is a statement that we --  
3 another male caller is hysterical, unable to understand male  
4 caller, states location Roosevelt Avenue.

5 MS. RYAN: Your Honor, referring back to our arguments  
6 from the letter, we contend that this entire SPRINT report is a  
7 business record. The fact that it's noting that this caller is  
8 hysterical, it goes to our argument that it's an excited  
9 utterance. It's a present-sense exception. It falls within  
10 the exception to hearsay. The whole thing should be admitted.

11 THE COURT: Give me a second.

12 (Pause.)

13 MR. PANEK: Our position, Your Honor, would be that  
14 there is no statement. That observation that someone who is  
15 hysterical called, there is no hearsay even admitted.

16 THE COURT: I'm trying to figure out what -- to be  
17 honest, I was trying to figure out that exact question, what is  
18 the statement. I understand that the SPRINT report itself  
19 is -- well, okay.

20 The SPRINT report, the document itself, you would  
21 agree, is a business record?

22 MR. PANEK: Correct, Your Honor.

23 THE COURT: So, there is -- if there is no statement,  
24 we don't have a hearsay problem then.

25 MR. PANEK: Well, it's still --

## Cortes v. City of New York

1 THE COURT: If it's not a statement, it's not an  
2 out-of-court statement for the matter asserted.

3 MR. PANEK: So now it's a hearsay statement of the  
4 SPRINT call scribner, who is characterizing the caller as  
5 hysterical.

6 MS. RYAN: Which would count under 803.6, Your Honor,  
7 as a business record.

8 MR. PANEK: The SPRINT call scribner, who is  
9 characterizing the male caller as hysterical; and, if the  
10 scribner is acknowledging they are unable to understand the  
11 male caller, how are we even certain that he is -- there is  
12 still a question of testing the mettle for, number one, the  
13 relevance and then the veracity of the statement; and this is  
14 just an outside call from anyone for any purpose that there was  
15 a hysterical male caller.

16 It's not the same number that my client called from.  
17 It's not the same number the bartender called from.

18 THE COURT: And they therefore wouldn't be able to say  
19 that it was your --

20 MR. PANEK: Or anyone.

21 THE COURT: They would say someone called.

22 MR. PANEK: What's the relevance of someone calling  
23 who can't be understood?

24 THE COURT: Let's move to statement three.

25 MR. PANEK: Sure. With respect to statement three,

## Cortes v. City of New York

1 Your Honor, it's plaintiff's position that this fails under --  
2 although, as we stated, the ambulance call report itself is a  
3 business report this is now a hearsay statement within that  
4 record, attributable presumably to this caller Peter. This  
5 would only qualify under, and it's only argued as potentially  
6 an excited utterance or a present-sense impression.

7 In looking at one of the cases that defendants cited,  
8 that's United States versus Steele, when you perform this  
9 analysis of looking at excited utterance or present-sense  
10 impression, the court still tests the mettle of the statement  
11 to see if it's actually buttressed by other facts in the  
12 record. Here, in the determination, there are no facts in the  
13 record that buttress this statement in any capacity.

14 In fact, the only fact that we have in the record is  
15 that ultimately all charges against Mr. Cortes were dismissed.  
16 He denies any of this particular conduct actually occurring,  
17 and now what we are doing is --

18 THE COURT: Can you all read this statement out loud  
19 for me so I can understand what it says.

20 MR. PANEK: Sure. In shorthand, no weapons and  
21 injuries. Perp male wearing white shirt, dot dot, irate, dot  
22 dot, throwing items around location, dot dot, hit bartender in  
23 the face. Wants male removed from location. SMC.

24 MS. RYAN: If I may, the MH in the first line is male  
25 Hispanic. SMC would be states male caller Peter.

Cortes v. City of New York

1 THE COURT: What's the last part?

2 MS. RYAN: They are identifying that he identified  
3 himself as Peter and he is a male caller.

4 THE COURT: Thanks. Wants ML removed.

5 MS. RYAN: Male. He wants the male who he identified  
6 as the mail Hispanic wearing a white shirt removed from the  
7 location.

8 MR. PANEK: And, Your Honor, just so we are clear, he  
9 wants a male wearing a white shirt removed from the location.  
10 Mr. Cortes, when he was arrested, is noted to be wearing a blue  
11 shirt. So, again, we are inviting a trial within a trial of  
12 unreliable hearsay.

13 THE COURT: Isn't that something that is subject to  
14 cross-examination?

15 MR. PANEK: I can't cross-examine a piece of paper,  
16 Your Honor.

17 THE COURT: Because it's just a document coming in by  
18 itself. How is the document coming in? Who is it coming in  
19 with?

20 MS. RYAN: Your Honor, we believe it would come in  
21 through Officer Smith, who was the arresting officer who  
22 responded to the call that was generated, these 911 calls.

23 THE COURT: How can he get the document in?

24 MS. GOYKADOSH: Sorry, Your Honor. If I may, I think  
25 he can testify that he received a radio run to respond to the

## Cortes v. City of New York

1 bar because of this bar fight. So he can respond to the  
2 content of the document.

3 THE COURT: He can't respond to the content of the  
4 document because he received a call. He can talk about the  
5 call he received and that he responded to that call, based on  
6 whatever information that was relayed to him; but I don't see  
7 how he gets this document in. He didn't prepare the document.  
8 He how does he -- how can he authenticate this document? How  
9 can he get it in?

10 MS. GOYKADOSH: I think that, based on my experience  
11 in the past with Judge Matsumoto, for instance -- we had a  
12 trial in January -- she allowed the officer who responded to  
13 the 911 call to be the one who the document was introduced  
14 through. So that's what we have done in the past.

15 THE COURT: That's an interesting theory, and I  
16 respect Judge Matsumoto but I don't base my rulings on hers.

17 So I would like you to refer me to the rules and tell  
18 me, consistent with the Federal Rules of Evidence, how it is  
19 that this officer can get this document in.

20 MS. GOYKADOSH: I don't believe that there are any  
21 authenticity issues with this document in and of itself. It is  
22 an NYPD document. It is prepared -- I mean, to the extent the  
23 court wants somebody from the NYPD.

24 THE COURT: It's not the court that wants somebody.  
25 It's the federal rules. I'm not making this up. These aren't



## Cortes v. City of New York

1 Judge DeArcy Hall's rules.

2 MS. GOYKADOSH: I understand, Your Honor; but, to the  
3 extent that somebody from the NYPD tapes and custodian of the  
4 records would be the one who needs to authenticate the  
5 document, that can certainly be arranged. It's been arranged  
6 in the past. But I do believe that this is a document that is  
7 authenticated already and doesn't need to be introduced through  
8 a custodian of records.

9 THE COURT: You have the officer who received the  
10 call, that relayed this information?

11 MS. GOYKADOSH: Yes.

12 THE COURT: All right. Let's just have him testify  
13 to it.

14 MS. GOYKADOSH: Thank you, Your Honor.

15 THE COURT: You won.

16 MR. PANEK: Thank you. Well, my concern, on the heels  
17 of that, is Officer Smith then just gets to say, I responded to  
18 a call, not I responded to a call of what the hearsay statement  
19 was.

20 THE COURT: Yes, he can, because it's not being  
21 offered for the truth; but it would be offered, in that  
22 instance, to be able to indicate why it was that he did what he  
23 did.

24 MR. PANEK: But there is no dispute why he did what he  
25 did was proper.

## Cortes v. City of New York

1 THE COURT: It doesn't have to be in dispute for it  
2 not to be hearsay. For that purpose, it's not being offered  
3 for the truth of the matter asserted, but it's to be able to  
4 show the effect on the listener, which is that he then went off  
5 to have Roosevelt Avenue or whatever.

6 MR. PANEK: Right.

7 MS. GOYKADOSH: Just to clarify, Your Honor, Officer  
8 Smith can testify to the fact that he went to Roosevelt Avenue  
9 because he got a call about a bar fight and that he did observe  
10 the victim, as it says there.

11 THE COURT: He is not going to say verbatim this  
12 information. He is going to rely -- he can relay what was said  
13 to him that --

14 MR. PANEK: So then he is going to say that there is  
15 no indication of a bar fight.

16 THE COURT: I don't know what he is going to say. I  
17 don't know what information was relayed to him in the 911 call.

18 MR. PANEK: Right.

19 THE COURT: It's about this document.

20 MR. PANEK: Because we are not getting into these  
21 underlying facts, if it's hearsay and the jury can't hear it,  
22 he can't then back door in that hearsay.

23 THE COURT: It's hearsay if it's being offered for  
24 truth of the matter asserted. It's not hearsay if it's offered  
25 for the effect on the listener.

## Cortes v. City of New York

1           So if he received a 911 call -- which, by the way, I'm  
2           assuming that what was relayed to him is somewhat different  
3           than what was written down here. He received some information.  
4           I don't know what that testimony will be. But he is allowed to  
5           say what made him go to the location.

6           MR. PANEK: Now, so probable cause, first, is not in  
7           dispute, Your Honor; and then, beyond that, what defense is  
8           trying to do here is their position on this is that the  
9           shoulder injury was caused in a bar fight; that there is no  
10          indication or no evidence that ever happened.

11          So what they are trying to do is have the officer  
12          testify to the fact that he was responding to the bar fight.  
13          So then use that as the truth of the matter asserted, with no  
14          other evidence whatsoever to say Mr. Cortes' injury came from a  
15          bar fight that the jury is hearing no evidence about; that  
16          there is no one to testify to that it ever happened.

17          THE COURT: What exactly did the 911 dispatcher say to  
18          the officer that prompted him to go to Roosevelt Avenue? I'm  
19          assuming it's Roosevelt Avenue.

20          MS. GOYKADOSH: Yes. So he received a 1010, which  
21          means that there has been an incident at the location. So he  
22          went to the location because of that. When he arrived there,  
23          when he arrived at the bar, he was informed that there was a  
24          bar fight.

25          THE COURT: Okay. So let's stop. So he received a

## Cortes v. City of New York

1 1010. That's why he went there. That's what will be said.

2 Now, in terms of testimony, once he arrived there,  
3 that's a whole different discussion. We haven't gotten there.  
4 I don't know what that discussion would be. But he certainly  
5 is going to be permitted to testify as to what the dispatcher  
6 told him, which prompted him to go, which does not sound like  
7 includes information concerning a bar fight.

8 MR. PANEK: Correct, which is why I took issue with  
9 that and got a little bit worked up over it.

10 THE COURT: So we are all on the same sheet of music?

11 MR. PANEK: Currently, yes.

12 MS. GOYKADOSH: Yes.

13 THE COURT: The dispatcher doesn't talk about a bar  
14 fight. That's not going to come in, based on this ruling here.  
15 I don't know what other kind of testimony they are going to try  
16 to elicit and whether that has any hearsay implications or not.

17 MR. PANEK: In our prior hearing on January 23, the  
18 court already ruled that the narrative information, which is  
19 the statement and the only statement as to what happened, which  
20 is a bartender saying he slapped me in the face or he hit me in  
21 the face with an open hand, has already been precluded. So no  
22 testimony about the conduct that took place at the bar is  
23 coming into trial.

24 MS. GOYKADOSH: The narrative has been precluded, but  
25 not the facts. So Officer Smith has his own observation of

## Cortes v. City of New York

1 what he saw when he got there, which would be indicative of a  
2 bar fight.

3 For instance, he saw bottles and ice on the floor of  
4 the bar. He also saw redness on the victim's face. These  
5 things are not hearsay. They are the officer's own  
6 observations. So he should be allowed to testify as to those  
7 facts.

8 MR. PANEK: Your Honor, first, we are using the term  
9 "bar fight." The allegation in this case was an open-handed  
10 slap in the face of a bartender. That's what Officer Smith  
11 said he arrested Mr. Cortes for.

12 So I have an additional motion in limine to preclude  
13 the use of the term "bar fight" in its entirety because it's  
14 entirely unsupported anywhere in the record, including from  
15 their own witnesses. So that characterization is so  
16 prejudicial and so belies the actual record before the court  
17 that it's believable that that's what they are trying to argue.

18 Beyond that --

19 THE COURT: The facts in this case -- is he correct  
20 that the facts in that case show that the officer arrested  
21 Mr. Cortes based on the belief that Mr. Cortes had slapped the  
22 victim in the face?

23 MS. GOYKADOSH: Yes, Your Honor.

24 THE COURT: That's the sum total of -- that's not a  
25 bar fight.

## Cortes v. City of New York

1 MS. GOYKADOSH: Well, there was also ice and bottles  
2 on the floor. So, which he threw, I do believe.

3 MR. PANEK: There is no statement of that.

4 MS. GOYKADOSH: According to the complainant, there  
5 was also an order of protection issued for the plaintiff.

6 THE COURT: That doesn't make it a bar fight. Bar  
7 fight conjures up like biker gangs, or at least it does in my  
8 mind. I don't know. It doesn't sound like a slap in the face.

9 So it doesn't sound to me that there is evidence that  
10 supports the notion that there was a bar fight. There was an  
11 assault at the bar by the slap in the face.

12 MS. JACOBS: I think it was not a bar fight in terms  
13 of there were multiple people who were tussling with each  
14 other.

15 I think it was, according to what the complaint said,  
16 which is supported in part by Officer Smith's observations, you  
17 know, the plaintiff threw bottles and ice and then slapped the  
18 complainant.

19 THE COURT: All right. I think the concern here is  
20 since this case is about the source and the cause of the  
21 particular injury, if you suggest that there was a bar fight it  
22 sounds like everybody was getting knocked and shoved around,  
23 and perhaps that could be the source of the injury. It doesn't  
24 seem like there is any evidence here that that happened.

25 It sounds like the only physical interaction or

## Cortes v. City of New York

1 conduct or engagement was a slap by Mr. Cortes, allegedly, of  
2 the victim and perhaps Mr. Cortes throwing bottles around. I  
3 think -- I don't want to create an impression of anything more  
4 than it was because certainly a bar fight could result in a  
5 rotator cuff injury, reasonably.

6 The jury may give greater pause as to whether  
7 Mr. Cortes slapping someone or throwing a bottle could have  
8 resulted in his injury, yes.

9 MR. PANEK: I just want to point out for the record  
10 there is no nonhearsay basis. There is nothing in the arrest  
11 narrative. There is nothing from Officer Smith about the fact  
12 anyone reported that he was throwing bottles, based on the  
13 police documentation.

14 So that's, again, just trying to pull in the hearsay  
15 of the SPRINT call and say that this person was now  
16 additionally --

17 THE COURT: The SPRINT call is not coming in.

18 MR. PANEK: Right. So beyond the SPRINT call, there  
19 is no indication in the record of throwing bottles. The fact  
20 that an officer goes to a bar and sees ice and bottles on the  
21 floor at 3 o'clock in the morning at a bar is welcome to  
22 virtually any bar in New York City.

23 But there is no statement by anyone. There is no  
24 allegation of this conduct except for in this 911 call that  
25 says it's a guy in a white shirt, when our guy is wearing a

## Cortes v. City of New York

1 blue shirt.

2 MS. GOYKADOSH: If I just may respond to that, Your  
3 Honor. There is a statement in the record, and that statement  
4 is Officer Smith's deposition testimony, where he testified  
5 that there was ice and bottles on the ground. So he can  
6 certainly to that, and the jury can make whatever inference  
7 they want based on that testimony.

8 To the extent that the word "bar fight" is  
9 inflammatory, if we should limit it to "assault" at the bar,  
10 that we can certainly instruct our clients, and we can make  
11 sure that we don't say bar fight.

12 But I just want to be sure about what we can say. Can  
13 we say there was an assault the at bar?

14 MR. PANEK: That goes to the charge, Your Honor.  
15 Plaintiff would happily stipulate and suggest that the court  
16 arrive at this happy medium. It is undisputed that Mr. Cortes  
17 as arrested at the scene due to the allegation that he slapped  
18 a bartender the face with an open hand. I'm fine with that.  
19 That's what the record supports. I will confront that fact.

20 But, inviting hiding behind the word assault or bar  
21 fight, let's call it for what it is and let's deal with it for  
22 what it was. He was arrested because someone said that he  
23 slapped them in the face.

24 MS. GOYKADOSH: Your Honor, I think this is becoming  
25 an issue of semantics. He was arrested for assault.



## Cortes v. City of New York

1 THE COURT: So then you don't have a problem with the  
2 plaintiff's suggestion?

3 MS. GOYKADOSH: That's right, Your Honor.

4 THE COURT: What was it?

5 MR. PANEK: It is undisputed that Mr. Cortes was  
6 arrested at Friends Tavern due to the allegation that he  
7 slapped a bartender with an open hand by the bartender.

8 THE COURT: Okay.

9 MR. PANEK: That solves everything, judge.

10 THE COURT: Good. All right. Here we go.

11 So Dr. Stein is a nonissue at this point, correct?  
12 Dr. Stein was whom? Remind me.

13 MR. PANEK: He is plaintiff's retained causation and  
14 prognosis expert, nontreating.

15 THE COURT: Nontreating expert. Is he still  
16 testifying? Where did we end up? Is he still testifying?

17 MR. PANEK: Yes, he is still testifying.

18 THE COURT: What transpired after I allowed you all to  
19 do this expert discovery? Someone catch me up.

20 MR. PANEK: So there was contemplation that  
21 Dr. Stein's initial report didn't show his work enough and was  
22 conclusory. So he was asked to write a more thorough, show  
23 your work, do your calculations analysis.

24 THE COURT: Yes.

25 MR. PANEK: Then he provided a much more toothsome

## Cortes v. City of New York

1 report that indeed showed all of his work and connected all of  
2 the dots.

3 THE COURT: Okay. All right. So then I have resolved  
4 all of the issues that were left outstanding and raised in the  
5 January 24 letters.

6 MS. RYAN: Your Honor, there was one other issue.

7 THE COURT: There was?

8 MS. RYAN: Yes. Plaintiff wanted the treating  
9 physicians to be able to testify as to causation, Dr. Capiola  
10 and Dr. Quach.

11 MR. PANEK: Your Honor, to make very short work of  
12 this, I don't intend to offer duplicative testimony and waste  
13 the jury's time. Dr. Stein will give an opinion as to  
14 causation. Treating doctors will talk about the treatment.

15 THE COURT: Great.

16 MS. RYAN: That's fine, Your Honor.

17 THE COURT: Okay. So does that then take care of all  
18 of the motions in limine that were raised prior to our  
19 adjournment in January?

20 MR. PANEK: Yes, Your Honor.

21 THE COURT: Okay. Good. So now I have motions  
22 in limine that were made since our adjournment by the defense.  
23 Right. I have got that right. Let me find it in my tab.  
24 Okay.

25 I don't want to address point one right now. I would

## Cortes v. City of New York

1 rather address the exhibit -- we have got to go to the exhibits  
2 on the JPTO. Same with point two. I have to go through this.  
3 All right. Maybe that's where we are. But there was another  
4 letter. Maybe the best way to do this is to go through the  
5 exhibits, I think. All right. Let me see, where is my JPTO?  
6 All right.

7 I have the JPTO that was filed on June 10. I want to  
8 make sure we are all operating off of the same document.  
9 Correct?

10 MR. PANEK: Yes, Your Honor.

11 THE COURT: All right. Okay. Let's talk about the  
12 witnesses. As for the plaintiff, obviously, the defense has no  
13 objection to the plaintiff being called; and then we have  
14 Officer Musa, to which the defendants have no objection.

15 There are then 11 additional witnesses. The first is  
16 Trooper Matthew Smith. Now, Trooper Matthew Smith is whom in  
17 relation to the events?

18 MR. PANEK: He is the arresting officer, Your Honor.

19 THE COURT: Musa was not the arresting officer, right?

20 MR. PANEK: Correct.

21 THE COURT: Musa was only at the scene. Why is there  
22 an objection?

23 MS. JACOBS: Your Honor, at this point we retained our  
24 objections that were dealt with previously in the January  
25 conference. We made our objections. They were overruled by

## Cortes v. City of New York

1 Your Honor.

2 THE COURT: I went through all these already?

3 MS. JACOBS: We did. There were only, in accordance  
4 with Your Honor's rulings after the trial was adjourned, we  
5 were only supposed to make changes relative to the experts.

6 THE COURT: Yes, you were.

7 MS. JACOBS: Those were the only changes that we made.

8 THE COURT: Forgive me then. Someone walk me through  
9 these witnesses. For some reason I thought we didn't go  
10 through this.

11 MR. PANEK: Sure. So just to bring you up to speed,  
12 Your Honor, at the last conference the motion in limine counsel  
13 is referring to was a motion in limine to blanket preclude kind  
14 of all of the paperwork by people other than Musa. As the  
15 court might remember, there is some high strangeness in that  
16 paperwork, in terms of what his condition was when he entered  
17 the precinct and whether or not certain paperwork was  
18 manufactured afterwards. The command log was changed.

19 THE COURT: Yes.

20 MR. PANEK: Things of that nature.

21 THE COURT: I recall that.

22 MR. PANEK: So these are witnesses who speak to the  
23 uncomfortable documentary evidence of the NYPD that day.

24 THE COURT: So where are we, because you all did me no  
25 favors by keeping all the objections in, if I resolved them.

## Cortes v. City of New York

1 MS. JACOBS: We --

2 MR. PANEK: Trooper --

3 THE COURT: Only one.

4 MR. PANEK: Trooper Smith, we do intend to have  
5 testify.

6 THE COURT: I have resolved that as an objection?

7 MR. PANEK: Right.

8 THE COURT: All right.

9 MS. JACOBS: Yes.

10 THE COURT: As for Espiritu?

11 MR. PANEK: Yes. So I do intend to call Espiritu, the  
12 EMT. That will be maybe five to ten minutes of testimony; and  
13 I will not be calling Butler, who is his companion, and the  
14 City has agreed to produce him.

15 THE COURT: Daly?

16 MR. PANEK: Daly, we will call him.

17 MS. GOYKADOSH: Your Honor, he needs to be properly  
18 subpoenaed by FDNY. I cannot produce him.

19 MR. PANEK: That's news to us.

20 MS. JACOBS: I believe we sent you an e-mail about it.

21 MR. PANEK: We will do it, a subpoena.

22 THE COURT: All right. A subpoena will issue.

23 MR. PANEK: Okay. So I just want to be clear.

24 Trooper Smith you are producing?

25 MS. JACOBS: Again, we will arrange for him to be

## Cortes v. City of New York

1 there. He does need a subpoena, but you can e-mail that to us,  
2 and we will make sure he appears.

3 MR. PANEK: Sure. That's fine.

4 THE COURT: So you will arrange for the appearance of  
5 Officer or Trooper Smith. You will -- I'm trying to  
6 understand. Are you -- will be you arrange for the appearance  
7 of Daly so long as they issue the subpoena?

8 MS. JACOBS: Yes.

9 THE COURT: Okay. Good. Sadiq.

10 MR. PANEK: Officer Sadiq, Your Honor, we have a  
11 question mark right now as to whether or not we are even going  
12 to call him at this point, in preparing the trial and kind of  
13 paring down the presentation. So a determination will be made  
14 of that within the next 24 hours.

15 He is an NYPD officer. So I assume that if we provide  
16 you a subpoena, you will produce him; but we will be happy to  
17 let you know he if we are not going to call him.

18 THE COURT: Okay. Good. Now it looks like we are  
19 getting to doctors.

20 MR. PANEK: Yes.

21 THE COURT: I think you just spoke to -- Stein is  
22 going to speak to causation?

23 MR. PANEK: Correct, Your Honor.

24 THE COURT: Quach?

25 MR. PANEK: Quach, Your Honor, we may not call. He

## Cortes v. City of New York

1 was listed on the initial JPTO in an overabundance of caution  
2 as a treating physician who would speak to causation. So  
3 inasmuch as Dr. Stein speaks to the causation and surgeries in  
4 his report, Dr. Quach is kind of duplicative as well.

5 THE COURT: Good. Let's streamline things.

6 Capiola is currently treating?

7 MR. PANEK: He is currently treating, and he will come  
8 in and talk about his current condition.

9 THE COURT: All right. That all makes sense.

10 MR. PANEK: Your Honor, before we shift gears, while  
11 we are on Dr. Stein, the court might remember Dr. Stein has his  
12 family vacation planned for Tuesday. Meaning he is leaving  
13 either Monday night or early Tuesday morning.

14 I just wanted to get a sense of how late we can expect  
15 to go Monday afternoon with the trial because I do have to take  
16 Dr. Stein out of turn, given those considerations.

17 THE COURT: We can go to 5:00 o'clock, which, because  
18 you are going to -- there was some back and forth about his  
19 testimony and the plaintiff needing to testify first.

20 How long is the plaintiff's testimony expected to go?

21 MR. PANEK: I would say --

22 THE COURT: I mean we are not talking about a lot of  
23 events.

24 MR. PANEK: Correct, but there is a Spanish  
25 interpreter, which does slow things down considerably.

## Cortes v. City of New York

1 THE COURT: It does, doesn't it?

2 MR. PANEK: So I would think it would be impossible to  
3 get the plaintiff -- assuming that jury selection takes place  
4 in the morning, and then afternoon comprises opening statements  
5 and then witnesses, it would be impossible to safely fit any  
6 portion of the plaintiff's testimony after opening statements  
7 before Dr. Stein testifies without risking going beyond  
8 five o'clock. I just don't want to run into that issue.

9 THE COURT: What you are asking me is to put the  
10 expert on as your first witness.

11 MR. PANEK: Yes, subject to connection of the  
12 plaintiff. I mean, the connecting underlying testimony is  
13 essentially the mechanism of injury and how he was hurt. So  
14 that very limited purpose is what's going to be subject to  
15 connection.

16 The rest of the medical records he relied on will  
17 presumably be in evidence by stipulation at that point. So  
18 it's subject to connection on very limited injury mechanism  
19 information.

20 THE COURT: Did you discuss the in evidence by  
21 stipulation with the defense?

22 MR. PANEK: Yes. We have worked to get them all of  
23 the medical record certifications so that they have no  
24 authenticity objections. So inasmuch as evidence opens, I  
25 intend to move those medical records into evidence immediately.



## Cortes v. City of New York

1 MS. GOYKADOSH: Your Honor, may I be heard? So, there  
2 are two issues. The first is the stipulation for the medical  
3 records.

4 We have informed counsel a number of times over e-mail  
5 that while they have provided us with certain certifications  
6 and we will not be objecting on authenticity, we are not  
7 stipulating to any records being admitted into evidence unless  
8 there is a foundation that's properly laid and they are either  
9 admitted through an expert or through a doctor or, if it's  
10 appropriate, for impeachment. So we are not stipulating to any  
11 exhibits just being entered into evidence. We are not  
12 challenging.

13 THE COURT: You are not challenging authenticity, but  
14 you are saying you need to go through the normal places to get  
15 it admitted?

16 MS. GOYKADOSH: For most. There are a few we have a  
17 few remaining authenticity issues with, but, for many, we are  
18 not raising those issues.

19 With regards to the order of witnesses, we would  
20 object to Dr. Stein being called before Mr. Cortes. There are  
21 a couple of reasons for this. The first is the jury needs to  
22 hear the foundational testimony and the fact testimony before  
23 an expert testifies. And the second --

24 THE COURT: But I am permitted to allow them to go out  
25 of turn, subject to connection. Am I not?

## Cortes v. City of New York

1 MS. GOYKADOSH: Correct, Your Honor. I think under  
2 Rule 611 the court has the discretion.

3 THE COURT: So in this case what real prejudice is  
4 there if I allow them to go out of course?

5 Look, this trial was supposed to happen on January 24.  
6 You both asked me to adjourn it. The adjournment put us in the  
7 middle of August, which is sacred vacation time in New York.  
8 We all know that.

9 So you all told me, at the time you asked me for the  
10 adjournment, that the reason why you wanted that adjournment,  
11 if my recollection serves, is that you wanted this case to be  
12 tried on the merits. You wanted the jury to be able to get all  
13 of the facts. So now here we are.

14 This doctor has a vacation planned, and the only way  
15 to get his testimony in practically is to take him out of turn.  
16 Wouldn't it undermine the parties' efforts to have the jury  
17 decide this case on the merits if I didn't allow him to testify  
18 out of turn, subject to connection?

19 MS. GOYKADOSH: I think there are two issues, and the  
20 first is that plaintiff is going to be in the courtroom. He is  
21 going to be hearing Dr. Stein's testimony, and there is a  
22 concern that he might alter his own testimony, based on what  
23 Dr. Stein testifies to. So that's number one.

24 THE COURT: I don't share that concern.

25 MS. GOYKADOSH: Okay. The second issue is just

## Cortes v. City of New York

1 plaintiff informed the court on, I believe it was June 4, that  
2 Dr. Stein would be traveling on August 12. So they have  
3 certainly had enough time to ask Dr. Stein to readjust his  
4 vacation plans. I understand that August is sacred vacation  
5 time, but this is something that they have known about far in  
6 advance as well.

7         Sixty days should be enough time for someone who is  
8 very important to their case to arrange their own vacation  
9 plans. So I think that that's something that could have or  
10 should have been dealt with.

11         THE COURT: Did you make any attempts to have him  
12 adjust his schedule?

13         MR. PANEK: Yes, Your Honor. Make no mistake about  
14 it, my preference would be to have to Mr. Cortes testify first.

15         When we initially wrote the court, we actually asked  
16 that, subject to the court's availability and scheduling, jury  
17 selection be conducted on a date prior, then we reconvene so  
18 that we can get foundational testimony. They objected to that.  
19 So they are trying to have their cake and eat it too and not  
20 have this case tried on the merits, when we are asking for a  
21 scheduling concern to be consented to in that regard.

22         I do, as I stand now, intend to make one more  
23 in-the-interests-of-justice pitch to Dr. Stein, but my  
24 indication so far is these are his plans, he is going away with  
25 his family, there is nothing I can do about it. That's the

## Cortes v. City of New York

1 hand that I have been dealt here; and, in terms of him being a  
2 retained expert for trial, he is under really no obligation.  
3 This is not a treating patient of his. He is participating  
4 voluntarily in this litigation. So my hands are kind of tied  
5 with this.

6 MS. GOYKADOSH: Your Honor, I do have one more  
7 concern, if I can raise it at this time. I think that if  
8 Dr. Stein is allowed to testify before plaintiff testifies that  
9 compromises our cross-examination of Dr. Stein. So, for  
10 instance, should plaintiff have testified first, he might say  
11 certain things when I cross-examine him. But if --

12 THE COURT: I didn't follow that last part, but go  
13 ahead.

14 MS. GOYKADOSH: Sure. To the extent plaintiff  
15 testifies first, he will testify to certain facts. He will say  
16 this happened in this way. We will not be able to ask  
17 Dr. Stein about plaintiff's own testimony if plaintiff  
18 testifies after Dr. Stein.

19 MR. PANEK: Your Honor, I could argue on the other  
20 side of the coin. Now they will have the benefit of cross  
21 examining the plaintiff with Dr. Stein's statements, and they  
22 could always pose a hypothetical, assuming that the plaintiff  
23 says this; and then if they get it, they get it. They can ask  
24 a hypo.

25 THE COURT: In terms of the foundational requirements

## Cortes v. City of New York

1 and why it is you would typically have an expert testify after  
2 the foundational facts have been into evidence doesn't really  
3 go to the concerns you are raising. That's not why it is that  
4 we typically order the witnesses in that way. So, okay, but  
5 that's not -- it doesn't really go to the issue of why it is  
6 that you would have the foundational testimony come in.

7 At the end of the day, it is not my preference. I'm  
8 going to ask the plaintiff to go back to the expert and see if  
9 he can rearrange his schedule. I would suggest that you tell  
10 him that this could potentially severely compromise your case,  
11 if he does not.

12 MR. PANEK: Your Honor, in that vein, I would just ask  
13 that inasmuch as I use tools at my disposal, i.e., offering to  
14 pay for travel plans and arrangements like that, that that be  
15 precluded from cross-examination, if I can elicit that  
16 agreement out of the doctor. Obviously, his ordinary --

17 THE COURT: He is saying if he pays for the travel to  
18 be switched around that you guys not use that as a basis for  
19 cross.

20 MS. JACOBS: That's fine, Your Honor. We can agree to  
21 that.

22 THE COURT: Go to your toolbox. Let's see if we can  
23 resolve this.

24 MR. PANEK: It would be my preference, Your Honor. So  
25 I am going to work diligently to do so.

## Cortes v. City of New York

1 THE COURT: Okay. Yes. I think it would be  
2 everyone's preference. I really do think it would be  
3 everyone's preference. I don't think the plaintiff wants to  
4 proceed this way either.

5 MR. PANEK: We could still pick a jury tomorrow, Your  
6 Honor, and then start Monday morning.

7 THE COURT: What day of the week are we at anyway?

8 THE CLERK: Tuesday.

9 MR. PANEK: I just know it's a weekday and it's not  
10 Friday. So I would be amenable to selecting a jury any day. I  
11 mean, obviously that's wishful thinking, but that would --

12 THE COURT: It is. To be honest, I know that I don't  
13 want to disrupt the administration of the courthouse and I will  
14 look into it, but I think it's doubtful. I wouldn't put any  
15 money on that.

16 MR. PANEK: You said go to my toolbox, and here it is.

17 THE COURT: Yeah, your toolbox, not mine. All right.  
18 Talk to the doctor.

19 MR. PANEK: I will, Your Honor.

20 THE COURT: Today.

21 MR. PANEK: Okay.

22 THE COURT: Inform the court tomorrow.

23 MR. PANEK: I have a meeting scheduled with him  
24 tomorrow. So I would ask that I just be able to do it then.

25 THE COURT: Let me know by end of the day tomorrow in

## Cortes v. City of New York

1 writing, and then we will see where we are.

2 MR. PANEK: Sure.

3 THE COURT: All right. Okay. So are there any issues  
4 with respect to the three witnesses that are proposed by the  
5 defense?

6 MR. PANEK: No, Your Honor.

7 THE COURT: So all of these are fine. Okay. Good.

8 Now, with respect to the exhibits, apparently I was  
9 far more productive at the last pretrial conference than I  
10 recall and, just quickly, starting at 1 for the plaintiff's  
11 just -- I mean the defendants' -- no, plaintiff's. Okay.

12 Where there are issues, none with Exhibit 1, correct?

13 MS. RYAN: Well, Your Honor, the issue that we have  
14 run into recently, we asked plaintiff last week for their final  
15 exhibits premarked, as required by Your Honor's rules, and some  
16 of the exhibits we received are not what are designated in the  
17 JPTO.

18 THE COURT: That's problematic.

19 MS. RYAN: So Exhibit 1 they designated Bates 3 and 4,  
20 which is the printed-out arrest report. We were given a  
21 handwritten scratch copy, which is a different document. And  
22 Your Honor's rules were that we would stick with the exhibits  
23 in the JPTO. There have been a number of changes. We are  
24 trying to resolve that, but to date we still have some issues.

25 THE COURT: Yes, my order was clear, that changes to

## Cortes v. City of New York

1 the JPTO would only be limited to those changes with respect to  
2 experts and exhibits related thereto.

3 MR. PANEK: Sure. So the arrest report that we are  
4 referring to, I correctly named the exhibit in the JPTO as the  
5 arrest report. It's not the Omni form report, which is what  
6 they are referring to. However, it was my mistake, and I Bates  
7 stamped the Omni form, which is a different form; but it's the  
8 same form. It's just whether it's handwritten or computer  
9 typed out. And we intend to use the handwritten form. But it  
10 is the exact same form, not a different document.

11 The scratch copy, the officer checks the boxes and  
12 writes in his handwriting at the scene. It's a more  
13 contemporaneous record. Then he goes back to the precinct,  
14 plugs it into the computer and creates the Omni form. I listed  
15 the arrest report, which is hand-scratched copy, but the Bates  
16 stamp range matched the Omni form, which was my mistake.

17 So there is no discernible difference between the  
18 documents in terms of their content. So I'm admitting the  
19 arrest report that I listed on the form.

20 MS. RYAN: Your Honor, I have both. The Bates numbers  
21 in the JPTO are the typed arrest report.

22 The scratch copy is a draft. It's not the finalized,  
23 official arrest report. They are both prepared at the  
24 precinct.

25 THE COURT: How are they different?



## Cortes v. City of New York

1 MS. RYAN: One, for example, is handwritten. It  
2 doesn't get typed in. Changes can be made from one to the  
3 other.

4 THE COURT: Have changes been made?

5 MS. RYAN: I would have to look at them side by side,  
6 Your Honor.

7 Permission to approach.

8 THE COURT: Yes. Thank you.

9 MS. RYAN: Your Honor, we note that the typed-out copy  
10 is the copy that was provided to us in January as the exhibit  
11 being used for the trial.

12 THE COURT: If they are the same, plaintiff, why is it  
13 that you prefer to use the handwritten version?

14 MR. PANEK: Because it has more of an effect and it  
15 leads to the absence of mistake, where the witness, if he is  
16 cross examined on the document, can't say, well, I don't know,  
17 this isn't my initial notation.

18 THE COURT: Well, in that case, then we pull this one  
19 out, right?

20 MR. PANEK: I would be happy to put them in together,  
21 Your Honor, and put them both in, in the interests of  
22 completeness. If they are saying that it's the typed version  
23 and there are no changes between the two.

24 THE COURT: But other than your concern that the  
25 officer may somehow say on the stand that some notation in here

## Cortes v. City of New York

1 was not his, what other reason do you have for wanting the  
2 handwritten copy?

3 MR. PANEK: Sure. There is, in my view or experience,  
4 be it right or wrong, jurors lend more credence when you can  
5 actually see the pen strokes and see what was done as opposed  
6 to a cold, computerized form. These were his observations on  
7 the scene. He checked those boxes. It wasn't done on a  
8 computer. It was done on a form with pen my him.

9 MS. RYAN: Your Honor, to clarify, the scratch copy is  
10 not completed on the scene. It's completed back at the  
11 precinct, before being typed into the computer.

12 Your Honor made the rulings already in January that we  
13 would stick to the designated exhibits based on the JPTO, which  
14 is Bates numbers 3 and 4.

15 THE COURT: Yes. We are going to stick with what was  
16 designated as 3 and 4. However, to the extent the officer  
17 tries to walk back anything in the typed-up version, the  
18 plaintiff is free to use the handwritten copy to either refresh  
19 his recollection or impeach him.

20 MR. PANEK: Yes, that's fine.

21 THE COURT: Okay. All right. Photographs, number 2.

22 MS. RYAN: Yes, Your Honor.

23 THE COURT: Any do we have any issues here?

24 MS. RYAN: No, Your Honor.

25 THE COURT: Okay. The medical treatment prisoner

## Cortes v. City of New York

1 form, D-211?

2 MS. RYAN: No, Your Honor.

3 THE COURT: Number 4, D-258 we are okay?

4 MS. RYAN: Yes, that's fine, Your Honor.

5 THE COURT: Trooper Smith's memo book?

6 MS. RYAN: No issue, except the copy we were provided  
7 had some additional redactions that were not proposed to us  
8 first.

9 THE COURT: The redactions are -- were included to  
10 redact hearsay statements.

11 MR. PANEK: Yes, Your Honor.

12 THE COURT: Did you take a look at the -- I'm assuming  
13 you have a nonredacted copy of that.

14 MS. RYAN: We do, Your Honor.

15 THE COURT: You all should confer and figure out if  
16 you have any issues.

17 MR. PANEK: All right.

18 MS. RYAN: Yes.

19 THE COURT: Yes?

20 MS. RYAN: For number 6, the copy of the command log  
21 designated in JPTO we have no issue with. The copy we were  
22 provided this week is, during discovery a second version of the  
23 command log was produced confidentially, to provide the names  
24 of other arrestees in the precinct. Plaintiff has put forward  
25 that copy as his proposed exhibit, which, again, is not in the

## Cortes v. City of New York

1 JPTO; but also there is 160.50 concerns, privacy concerns of  
2 these other individuals who happened to be arrested at the same  
3 time as plaintiff.

4 MR. PANEK: Your Honor, those concerns are only valid  
5 if they know those arrests to be sealed. We were provided by  
6 defendants today a copy of the pages of the command log that  
7 has our pertinent information.

8 I already informed counsel that I'm happy to put in  
9 exhibits -- pages 41 through 47, as initially redacted, along  
10 with this page, and we will just take out the pedigree  
11 information of the people who were arrested; but I still want  
12 this to have the effect of showing that you don't just cross  
13 things out in the command log and write over them.

14 MS. RYAN: Your Honor, this exhibit is six pages of a  
15 book that's probably a good three inches wide. The pages 41  
16 through 47, the arrest stamps for other people are fully  
17 redacted. It doesn't have just their pedigree information.

18 So they are proposing changing redactions that were  
19 done in discovery because we provided them with a full-size  
20 color. We thought it would be easier to show plaintiff's  
21 arrest stamp.

22 THE COURT: What is this new version that you are  
23 trying to get in?

24 MS. RYAN: This is a color copy of plaintiff's arrest  
25 stamp. This is the normal size of the command book. We

## Cortes v. City of New York

1 thought it would be easier to read.

2 MS. JACOBS: Essentially, Your Honor, what our  
3 proposal is that we would redact that, as D-41 through 47 were  
4 redacted, just to have it be a larger size and a color copy so  
5 it's a little clearer for everyone to use. Again, this was the  
6 document as it was proposed in January. The only change is  
7 that it's a slightly better copy, but, otherwise, with those  
8 same redactions as they were proposed in January with those  
9 Bates stamps in January.

10 MR. HARVIS: Your Honor, I would just say the  
11 redactions that were made during discovery doesn't necessarily  
12 govern, when we are here to have a trial on the merits, and the  
13 jury should see what relevant evidence there is. So we now  
14 have this form. We are happy to deal with the redactions that  
15 relate to privacy or sealing interests.

16 But to then go forward and just black out the boxes of  
17 this that have no basis for redaction, we think, is taking it  
18 too far.

19 THE COURT: Why isn't it simply redacting any  
20 information that might tread on privacy issues not sufficient?

21 MS. JACOBS: Again, Your Honor, I might think our view  
22 of what are not privacy issues -- first names, last names --  
23 that is one issue. I think we should redact out the whole name  
24 of people to the extent we are dealing with privacy issues, but  
25 I think --

## Cortes v. City of New York

1 THE COURT: I don't think the plaintiff has an issue  
2 with that.

3 MR. PANEK: We don't.

4 MS. JACOBS: That's fine. Beyond that, again, this is  
5 going back to at our conference in January Your Honor stated  
6 that we could not make changes.

7 THE COURT: This is the same document blown up?

8 MS. JACOBS: But the redactions they are proposing are  
9 different. I understand that those redactions do not  
10 necessarily, you know, the reasons for those redactions may be  
11 different now. Again, they were provided with two copies of  
12 the command log, one during discovery.

13 They chose which one they wanted to use for the trial  
14 in January, with redactions on it, and now they are trying to  
15 change that; and I don't think that should be permitted.

16 MR. PANEK: Listing the documents on the JPTO does not  
17 preclude us from seeking to redact the redactions at trial.  
18 That's a redaction.

19 MS. JACOBS: Again, that wasn't addressed at our final  
20 pretrial conference in January.

21 THE COURT: Yes, but thank God we are having another  
22 one today. Just redact the information that has the privacy.  
23 I don't want any privacy concerns to be raised. So the full  
24 name is going to come out. If there are other privacy  
25 concerns, that's my concern.

## Cortes v. City of New York

1 MS. JACOBS: Understood, Your Honor.

2 THE COURT: So nothing that treads on anyone else's  
3 privacy concerns.

4 MR. PANEK: No intention. Names and addresses out.

5 THE COURT: Perfect. All right. Next.

6 MS. RYAN: No issue with Exhibit 7, Your Honor, or  
7 Exhibit 8.

8 THE COURT: Okay.

9 MS. RYAN: Exhibit 9, we did not receive a  
10 certification from plaintiff on these, but we are not going to  
11 raise an authenticity objection on these records.

12 MR. PANEK: I have one, if you want anyway.

13 MS. RYAN: Okay. Great.

14 THE COURT: 10.

15 MS. RYAN: 10, there was some confusion. They  
16 provided us a certification with no records attached, so we  
17 weren't sure what --

18 THE COURT: They were certifying?

19 MS. RYAN: What was certified and what wasn't, but  
20 they appear authentic. We are not going to raise an issue on  
21 these.

22 MR. PANEK: I can explain that, if the court is  
23 interested in hearing.

24 THE COURT: Not really.

25 MR. PANEK: All right.

## Cortes v. City of New York

1 THE COURT: I mean you all resolved it. All right.  
2 11?

3 MS. RYAN: Yes. So 11 had some issues as far as the  
4 final exhibits we received last week. Our understanding of --  
5 we had a conversation with plaintiff, that they had provided us  
6 complete records for certifications but were going to use the  
7 Bates-stamped version as long as the Bates-stamped pages were  
8 in the certified complete copy.

9 However, the final version of Exhibit 11 we received  
10 had no Bates stamps on it. So we have been trying to match  
11 them up ourselves.

12 MR. PANEK: Last night, did you get the Dropbox link?

13 MS. RYAN: We got that at 11:00 p.m. So we haven't  
14 had a chance.

15 THE COURT: Did you fix the problem?

16 MR. PANEK: Yes. So the confusion, Your Honor, was  
17 counsel was telling me we will not agree to the authenticity of  
18 any records unless they are complete and certified. So I took  
19 that to mean, okay, you want me to put into the evidentiary  
20 exhibits complete, certified records, which is what I did.

21 Then they turned around and said, well, it doesn't  
22 match the Bates stamps; and I said, well, you asked for  
23 complete certified records, which is what I gave you, and then  
24 I said if your concern was just one of generally are these  
25 authentic and contained in the universe of the certified



## Cortes v. City of New York

1 records, I will revert it back and keep it to the Bates-stamped  
2 initial copies, which is what I did then provide them last  
3 night.

4 THE COURT: All right. You all review that.  
5 Presumably the issue has been resolved and we are in good  
6 shape.

7 MS. RYAN: Yes, sure. For Exhibit 12, Dr. Batilova  
8 appears to be a provider from Queens Health Center. So we are  
9 not raising authenticity issues although I notice that the  
10 records show up in other exhibits randomly as well.

11 MR. PANEK: Exactly. They are contained in other  
12 exhibits, which was part of the confusion with all of the  
13 certifications, because he gets treatment at a union health  
14 center that compiles all of his records in addition to the  
15 individual providers.

16 THE COURT: All right. So do we have an issue?

17 MS. RYAN: We will.

18 THE COURT: Are we okay with 12?

19 MS. RYAN: We should be fine with 12, Your Honor.

20 THE COURT: Okay. Good, Dr. Capiola, number 13.

21 MS. RYAN: We did not receive a certification for  
22 these. I assume Dr. Capiola will be able to authenticate them  
23 if he is testifying.

24 MR. PANEK: That's why I didn't put them in.

25 THE COURT: Okay. Jean Paul Toussant.

## Cortes v. City of New York

1 MS. RYAN: We do object to these. There is no  
2 certification.

3 MR. PANEK: I will take them out.

4 MS. RYAN: There is no certification. Okay.

5 THE COURT: Okay. Quach, he is going to testify --  
6 no, he is not testifying anymore.

7 MR. PANEK: No, no -- yes, correct, Your Honor.

8 However, I just want to note in the e-mail I sent  
9 late, late last night, I made a mistake. 11 and 15 are the  
10 same records. They are contained in Queens Hospital and  
11 Dr. Quach, because he is out of the hospital. It's the same  
12 universe of records.

13 THE COURT: You are speeding up again.

14 MR. PANEK: That's okay.

15 THE COURT: I'm going to slow you down so by the time  
16 you get before the jury they can understand what you are  
17 saying.

18 MR. PANEK: So, with respect to those records, it's  
19 going to be 11 and 15 will be reflected as one exhibit.

20 THE COURT: Are you saying they are identical, or 15  
21 is contained in and subsumed by 11?

22 MR. PANEK: They are identical, and both are subsumed  
23 in the others. It's just the manner in which the records  
24 appear. If you get them from Dr. Quach's office they appear  
25 different than the hospital. If you get them from the

## Cortes v. City of New York

1 hospital, they appear different than Dr. Quach. However, they  
2 are the same records, so we are just going with the  
3 Bates-stamped ones.

4 THE COURT: Which is 11?

5 MR. PANEK: Which is 11.

6 THE COURT: No more 15?

7 MR. PANEK: More 15.

8 THE COURT: I'm not going to try to pronounce this  
9 doctor's name.

10 MS. RYAN: I believe it's Senevirante. We had  
11 indicated to counsel last night there was a bunch of confusion  
12 as to the Bates numbers and the certified copy. The certified  
13 copy we received was very different than the previously Bates  
14 version. We can only authenticate about ten pages of the 60 or  
15 so that they designated. I know counsel indicated he may have  
16 fixed some of these problems last night, but that's where we  
17 are at this moment.

18 THE COURT: So confer. We will address it early  
19 Monday morning.

20 The MRI films, 17?

21 MS. RYAN: No issue, as long as they are properly --  
22 the foundation is properly laid with them with the doctors.

23 THE COURT: Okay. Nothing. 18 is fine.

24 MS. RYAN: 18 is fine.

25 MR. PANEK: Your Honor, when you say the foundation is

## Cortes v. City of New York

1 properly laid, they are certified records. They go into  
2 evidence. There is no further foundation. These are now  
3 certified records related to Gonzalo Cortes. So they go into  
4 evidence. There is nothing further I need from a custodian or  
5 doctor to make them admissible per se.

6 THE COURT: I think she is saying that is there a  
7 doctor who can say I ordered this MRI. I think that's what you  
8 are talking about.

9 MS. RYAN: Yes, Your Honor. They are not going to try  
10 to bring in the MRI on plaintiff or a police officer.

11 THE COURT: How did the MRIs come about?

12 MR. PANEK: In the course of his ordinary treatment.

13 THE COURT: Through whom?

14 MR. PANEK: Twenty to thirty union hall doctors, who  
15 ordered his treatment and those records, ordering MRIs are  
16 going into evidence.

17 THE COURT: Are any of the doctors testify to -- one  
18 of them is a treating physician?

19 MR. PANEK: Sure. I only intend to use medical  
20 records with medical doctors, if that's the concern. I'm just  
21 confused.

22 THE COURT: I think that's good. I think that's it.  
23 Right?

24 MS. RYAN: Yes, Your Honor.

25 MR. PANEK: I don't intend to show Mr. Cortes an MRI

## Cortes v. City of New York

1 and ask him to become a radiologist.

2 MS. RYAN: That should be fine, Your Honor, as long as  
3 it comes in with the doctors. It's not just an MRI film on a  
4 screen with no doctor.

5 THE COURT: The concern here, I think, was that you  
6 were just going to put them in evidence; that there was not  
7 going to be a witness that was going to lay a foundation for  
8 the documents before they came in. Presumably you are going to  
9 talk about them with a doctor.

10 MR. PANEK: Well, I'm just -- perhaps it's my  
11 misunderstanding. The foundational elements of making the  
12 records admissible into evidence is met by the certification,  
13 meaning that they are Mr. Cortes' records, they are certified  
14 to be complete, and this is what a custodian would give me.

15 THE COURT: That's authentication.

16 MR. PANEK: Correct.

17 THE COURT: She is talking about foundation.

18 MR. PANEK: How I use them is not a question of -- I  
19 guess it's, doctor, are you capable of interpreting an MRI is  
20 what we are talking about, which is the foundational  
21 requirements.

22 THE COURT: Did he look at these MRIs before?

23 MR. PANEK: Yes.

24 THE COURT: I'm certain that when you ask him about  
25 that, he is going to be able to lay a foundation for them.

## Cortes v. City of New York

1 Right?

2 MS. RYAN: Yes. I agree authenticity and foundation  
3 are two separate issues.

4 MR. PANEK: But it doesn't have to be the person who  
5 ordered the MRI.

6 THE COURT: He is concerned that you are going to  
7 demand that the person who ordered the MRI come in. You are  
8 not saying that.

9 MS. RYAN: We just require the proper foundation to  
10 prove relevancy on the stand.

11 MR. PANEK: Sure.

12 THE COURT: All right. Now, the illustrations of the  
13 surgery.

14 MS. RYAN: Yes, Your Honor. We did have an issue with  
15 this. We received them last week for the first time.

16 They have plaintiff's name on them. We asked counsel  
17 where they were from, and we were told it's of no moment where  
18 they came from. So we do have some concerns as to the  
19 foundation and who made these.

20 MR. PANEK: I later told them they were done by a  
21 medical illustrator, and I agreed that a proper foundation has  
22 to be laid for their admissibility.

23 THE COURT: What's a medical illustrator?

24 MR. PANEK: A medical illustrator is someone who will  
25 help a jury understand injuries by illustrating them

## Cortes v. City of New York

1 anatomically. I'm happy to show Your Honor the exhibits so you  
2 can have a better understanding.

3 THE COURT: Uh-huh. Is this illustrator coming into  
4 the courtroom?

5 MR. PANEK: No, but the doctors will authenticate that  
6 they are fair and accurate; that they would assist the jury in  
7 understanding the anatomy; that the demarcations on --

8 THE COURT: Slow down. That they are fair and  
9 accurate what?

10 MR. PANEK: A fair and accurate representation of the  
11 anatomy and fair and accurate illustrations of the plaintiff's  
12 actual injuries, as documented through his medical records, and  
13 that these demonstratively would assist the jury in  
14 understanding without having medical training.

15 THE COURT: Okay. Stop. So you want to use this as a  
16 demonstrative. You are not suggesting that it's coming in as  
17 evidence?

18 MR. PANEK: Correct.

19 MS. RYAN: Your Honor, we have been told that -- we  
20 don't have the name of the medical illustrator. We don't know  
21 what their credentials are. I understand a doctor may be able  
22 to say the anatomy looks right; but they also proposed an iPad  
23 app as a demonstrative and a handheld shoulder as a  
24 demonstrative. So it's a bit cumulative to have all three,  
25 especially when we don't know where these came from.

## Cortes v. City of New York

1 THE COURT: You all have a medical expert as well,  
2 right? Have you shown these illustrations to your medical  
3 expert to see?

4 MS. RYAN: No, Your Honor, because we were just  
5 provided with these last week. So we sent them over, but he  
6 wasn't able to look at these when preparing his expert report.

7 THE COURT: Okay. So, I'm clearly no doctor. But it  
8 seems to me, for the purposes of using them as a demonstrative,  
9 that you would need to -- that you should, the defense, show  
10 these to your expert. Let's see if they accurately reflect the  
11 injury itself. Right?

12 This case is, in large measure, about the causation of  
13 the jury as opposed to whether the injury exists. So if your  
14 doctor says, yeah, this reflects the type of injury that he --  
15 accurately reflects the type of injury that he has, then it may  
16 actually be helpful as a demonstrative, not as evidence. And  
17 then, we can address your concerns regarding whether the  
18 demonstratives are cumulative separately.

19 Everyone can decide what they think will be helpful,  
20 but it would not be used for the purpose of evidence. See if  
21 your doctor has an issue with it. Maybe it's helpful.

22 MS. RYAN: We will discuss it. Thank you, Your Honor.

23 THE COURT: All right. Thank you, but, again, I need  
24 to be clear, not as evidence, only as a demonstrative; and  
25 that's number 19. Right?



## Cortes v. City of New York

1 MS. RYAN: Yes, Your Honor.

2 MR. PANEK: Yes, Your Honor.

3 THE COURT: Okay. Is this the same as 20? Is this  
4 another version?

5 MR. PANEK: Yes, Your Honor.

6 MS. RYAN: 20? I thought 20 was the iPad.

7 MR. PANEK: 20 is just -- it's an app that shows  
8 anatomy. Just so that -- I mean, it's prepared by Stanford  
9 Medical School. It's called Shoulder Pro, and it essentially  
10 shows bones and what the names of those bones are, so that the  
11 jury can understand the shoulder; and it assists them, as  
12 demonstratives, in understanding the ligament structure and  
13 understanding the causation of the injuries.

14 THE COURT: I really don't want to take this jury to  
15 medical school. I just don't, and I don't think you do either.

16 MR. PANEK: So in this particular case, Your Honor,  
17 it's vital to understanding and corroborating the manner in  
18 which Mr. Cortes describes being injured versus what was  
19 actually found inside of his shoulder because the injury is  
20 important corroborating evidence that speaks to the manner in  
21 which his shoulder was injured.

22 So in some respects the jury must go to medical school  
23 to understand just that this injury was caused by this  
24 mechanism and why.

25 THE COURT: I would rather have them take a class. I

## Cortes v. City of New York

1 don't want them to come out with degrees.

2 MR. PANEK: Yes.

3 THE COURT: So we have -- this is the cumulative  
4 question, I guess. How is this any different, these two.

5 MR. PANEK: This --

6 THE COURT: How much time do you intend to spend on  
7 these?

8 MR. PANEK: Five minutes.

9 THE COURT: Have you shown -- have they looked at this  
10 app?

11 MR. PANEK: I gave them a link to it.

12 MS. RYAN: We were given a link and told we could buy  
13 it, if we wanted. We also asked, if they are going to be  
14 permitted to use it, that we be allowed to use the same app,  
15 the same iPad.

16 THE COURT: Yes is the answer. Let's figure out a way  
17 for them to be able to have access to this now. I would like  
18 you to also pass, you know, show this to your doctor.

19 If we are not talking about a lot of time and if  
20 everybody thinks it's actually helpful, because, heck, your  
21 doctor may decide they want to use it. I don't know.

22 MR. PANEK: Or, Your Honor, you know what. I also  
23 sent them a link to a physical, little like plastic shoulder  
24 model. I will just use that and not the app, to streamline the  
25 process; and the doctor, if he can come down and say this is a

## Cortes v. City of New York

1 shoulder, this is this, this is that, that's fine too, judge.

2 THE COURT: I don't have a preference. I just want to  
3 make sure it's not necessarily complicated and duplicative for  
4 the jury. If you prefer the shoulder. I don't know.

5 MR. HARVIS: I'm sorry. Speaking of medical issues, I  
6 have to run to the bathroom. I don't mind if everyone else  
7 handles it. Is that okay?

8 THE COURT: Just go ahead.

9 MR. HARVIS: Thank you very much. I will be right  
10 back. They can handle it.

11 (Mr. Harvis left the courtroom.)

12 THE COURT: All right. If you don't want to use the  
13 app anymore, but the thing is I'm not -- what I would like for  
14 you to do is to make them all available to the defense. Let  
15 the defense take a look at all of them. I don't want to, by  
16 default, you know, put the defense in a position where they are  
17 stuck with a shoulder model. Let them see them all. You all  
18 talk it out, figure it out. How about that?

19 MR. PANEK: Sure. I will make a determination by this  
20 evening as to what I'm going to use and will provide it to  
21 them.

22 Just my just concern is this is a paid application  
23 that costs money, and I don't know, other than saying borrow my  
24 iPad that's connected to every case in my office, how to give  
25 it to them, so to speak.

## Cortes v. City of New York

1 THE COURT: So that's why you are saying never mind  
2 with that.

3 MR. PANEK: Yeah.

4 THE COURT: Okay. Never mind with the iPad then.

5 MR. PANEK: I don't know that I can do that.

6 THE COURT: Fair enough. No iPad.

7 MR. PANEK: Sure.

8 THE COURT: Okay. Good. So number 20 was the iPad.

9 MS. RYAN: Yes, Your Honor.

10 THE COURT: So that's out. The shoulder you guys are  
11 going to talk about.

12 MS. RYAN: Yes.

13 MR. PANEK: Yes.

14 THE COURT: Again, as a demonstrative, not as  
15 evidence.

16 MR. PANEK: Correct.

17 THE COURT: Okay. Prisoner holding pen roster.

18 MS. RYAN: Yes, Your Honor. We don't object --

19 THE COURT: Oh, I don't know why I read that that way.  
20 I read it as a prisoner holding a pen roster. I'm sorry.  
21 Okay.

22 MS. RYAN: We don't object to the document itself.  
23 Version we received from counsel has no redactions of the other  
24 arrestees' names. So we would have those privacy concerns.

25 THE COURT: You will address that.

## Cortes v. City of New York

1 MR. PANEK: Sure. Okay.

2 THE COURT: Okay. All right. 23.

3 MR. PANEK: Not an issue. Not used, Your Honor.

4 THE COURT: Okay. That's out.

5 MS. RYAN: 24 we don't fully understand.

6 THE COURT: So it's not a document.

7 MS. RYAN: Yes.

8 THE COURT: Correct. So it's a nothing.

9 MR. PANEK: In my experience, Your Honor, when doctors  
10 come in to testify about a patient they are treating, they  
11 ordinarily will bring their chart from their office in. I'm  
12 just reserving my right to move that chart into evidence; but  
13 if the court so precludes it, then I will not do so.

14 THE COURT: Right. It's out. Okay.

15 The expert report itself is not evidence.

16 MR. PANEK: We listed that in an overabundance of  
17 caution. We don't intend to offer it.

18 THE COURT: Okay. Good. And we still have a lot  
19 more.

20 MS. RYAN: Yes, Your Honor.

21 THE COURT: Geez.

22 MS. RYAN: Some of them can be grouped together.

23 MR. PANEK: I think there is only three more.

24 MS. RYAN: 26, the intraoperative photos, we have made  
25 a motion in limine on this, that these should be precluded.

## Cortes v. City of New York

1 They were not properly provided. Your Honor had previously  
2 precluded them because they had not been provided during  
3 discovery, and now he added it back onto his JPTO.

4 THE COURT: In connection with his expert?

5 MR. PANEK: Correct, and the court explicitly stated  
6 that exhibits related to expert discovery would be reopened.

7 These exhibits were provided more than six months  
8 prior to their retention of an expert. They elected to not  
9 show them to their expert, even though they were aware, in  
10 Dr. Stein's report that Dr. Stein was relying on them in his  
11 report, and they elected to do so at their own peril.

12 (Mr. Harvis entered the courtroom.)

13 MR. PANEK: Both parties agreed we wanted a trial on  
14 the merits, as the court has stated. These are photographs of  
15 the inside of plaintiff's shoulder when the surgery was taken  
16 that show his surgery. How could anything be more on the  
17 merits than those actual photographs?

18 MS. RYAN: Your Honor, if I may, a few issues. I  
19 think this is a way for plaintiff to back door around your  
20 Honor's ruling from January. You precluded these photos. They  
21 showed them to their expert in an attempt to bring them in  
22 through their expert.

23 They are also not certified. And I don't know -- as  
24 Your Honor said, we are not taking the jury to medical school.  
25 They don't need to see 20-something photos of the inside of

## Cortes v. City of New York

1 plaintiff's shoulder. Some jurors may also be squeamish and  
2 may not want to see the inside of plaintiff's shoulder.

3 THE COURT: Well, they will have to get over that.

4 This is the deal. We opened up discovery to allow  
5 expert discovery. The plaintiff had to have the ability to  
6 provide the experts with whatever it is that they wanted him to  
7 rely on. You all agreed to reopening expert discovery.

8 I don't understand how this isn't fair game. Doesn't  
9 the fact that I reopened expert discovery, notwithstanding -- I  
10 understand that absent the use of these photographs with an  
11 expert I had said no, I wish I could recall my rationale right  
12 now.

13 MR. HARVIS: It was the imminence of trial, Your  
14 Honor. It's very clear from the transcript. We were only five  
15 days before the trial when Your Honor issued the prior ruling.

16 MS. RYAN: Your Honor, you precluded these photos and  
17 workmen's comp documents on the same grounds, that they were  
18 not provided during discovery.

19 THE COURT: Right, but then we reopened up, to a  
20 certain degree, but not -- we reopened expert discovery. How  
21 is this not fair game?

22 MS. RYAN: Your Honor, we took it Your Honor had  
23 precluded these as not for discovery. So we didn't use this.  
24 We presumed that plaintiff would follow the same rulings.

25 THE COURT: But my ruling was to exclude them but to

## Cortes v. City of New York

1 allow expert discovery. I think that the plaintiff is right,  
2 that at a minimum, I think, it should have resulted in a  
3 conversation, a question to the court, and not necessarily a  
4 presumption.

5 Because I don't know how I can open up expert  
6 discovery and then tie one hand behind plaintiff's back in  
7 terms of how it is that their expert prepares their opinion.  
8 Right? Because in the normal course they would provide their  
9 expert with whatever it is that their -- that they believe  
10 their expert needs. They have to then append to the report a  
11 list of all of the materials that the expert relied upon. I'm  
12 assuming that they did so.

13 MR. PANEK: We did.

14 THE COURT: Effectively, you are saying that by my  
15 ruling, which was based on the timing of trial, which was then  
16 adjourned at your request, joint request, that they were not  
17 going to be able to give their expert all of the information  
18 that they believed their expert would need to be able to  
19 formulate an informed opinion?

20 MS. RYAN: That was our understanding, Your Honor,  
21 that they weren't provided during discovery, which was the  
22 basis of Your Honor's ruling; not the closeness of trial, but  
23 that they had not been requested and properly provided so they  
24 were out. We considered them out of the record, as we did the  
25 workers' comp documents. Maybe that was our misunderstanding



Cortes v. City of New York

1 of Your Honor's ruling, but we understood your rationale as if  
2 it wasn't properly provided during the case it was not part of  
3 the record.

4 MR. HARVIS: Your Honor, if I may. It's very  
5 important to bring up the fact that during the entire discovery  
6 phase of this case there were never document demands served by  
7 the defense. They never served Rule 34 requests at all.

8 So for them to now come and try to compare a workman's  
9 compensation record that they never even made an attempt to  
10 obtain during discovery, was something that we learned about in  
11 January, the existence of these photos -- what I would say is  
12 it's apples and oranges, in our view, because we are talking  
13 about you reap what you sow to a certain extent. When it comes  
14 to not making document requests and not getting things, that's  
15 one situation; as opposed to utter diligence, where as soon as  
16 you have things on a voluntarily basis with no demands you are  
17 producing them.

18 THE COURT: You all didn't make any discovery  
19 requests?

20 MS. GOYKADOSH: Your Honor, I was not involved in  
21 discovery.

22 MS. JACOBS: Your Honor, I was, and I did not. I have  
23 fallen on the sword a number of times in front of Your Honor.

24 THE COURT: I'm sorry. I don't mean to revisit this.

25 MS. JACOBS: It is fine, Your Honor. This case is not

## Cortes v. City of New York

1 my finest hour in discovery, but we are here where we are now;  
2 and that is, where we are now is that they had these records,  
3 and the fact that these illustrations existed, should -- was  
4 obvious from the records they did provide during discovery.

5 THE COURT: What are these photographs of?

6 MR. PANEK: They are photographs of the inside of  
7 plaintiff's -- I never knew this, but apparently during  
8 arthroscopic surgery there are photographs taken when the  
9 surgery is performed, and a doctor looking at those photographs  
10 can tell a lot about the nature of the injury. So before the  
11 last pretrial conference we sent all these photographs over to  
12 them. And then said -- they came in, and there was a lot of  
13 good for the goose, good for the gander was the phrase we kept  
14 using in the prior conference, and an equivalence developed  
15 between documents that they didn't get, the photographs, which  
16 we didn't know about and were never requested, and workers'  
17 compensation records that they never subpoenaed during  
18 discovery, even though they had every reason to do that. It  
19 came up at his deposition.

20 MS. GOYKADOSH: Your Honor, if I may be heard?

21 THE COURT: Let them finish. Were you finished?

22 MR. HARVIS: Well, I mean, I was going to have --  
23 Mr. Panek was going to show you photographs.

24 MR. PANEK: Importantly, we reopened expert discovery.  
25 This is part of expert discovery.

## Cortes v. City of New York

1 MR. HARVIS: There were defects in the report that  
2 prevented --

3 THE COURT: Only one of you at a time.

4 MR. HARVIS: I'm going to sit down.

5 THE COURT: He is doing a good job. Let him do it.

6 MR. HARVIS: I agree. Thank you.

7 THE COURT: I'm squeamish, by the way, and these are  
8 fine. When were the expert reports exchanged?

9 MR. PANEK: We exchanged our report in, I believe,  
10 March, March 6; and they exchanged their report two and a half  
11 or close to three months later, May 28.

12 MR. HARVIS: I believe it was March 25 for our report  
13 and May 28 for their report. Ours was before the deadline.

14 THE COURT: He has it.

15 MR. HARVIS: You said March 6.

16 THE COURT: Good enough. Good enough. All right.

17 And you provided them with a list of the documents you  
18 relied upon?

19 MR. PANEK: And they are explicitly addressed in my  
20 experts reports as well.

21 THE COURT: How many documents were there?

22 MR. PANEK: That my expert reviewed in total?

23 THE COURT: I'm just curious.

24 MR. PANEK: Maybe ten or twelve, Your Honor.

25 THE COURT: Uh-huh. Okay. Yes.

## Cortes v. City of New York

1 MS. JACOBS: Your Honor, may I be heard? A couple of  
2 issues.

3 The first is I know this has been raised a number of  
4 times, about the discovery requests, but I do think that the  
5 fact that discovery requests may or may not have been made  
6 doesn't have to do anything with plaintiff using documents as  
7 part of their case in chief. That's required under Rule 26.

8 Putting that aside, there have been a number of  
9 representations made about plaintiffs just -- plaintiff just  
10 learning about these intraoperative photos in January and  
11 letting us know as soon as he learned about those photos.  
12 However, the medical records indicate that -- plaintiff's own  
13 medical records indicate that there were these photos. They  
14 are black and white, but they certainly could have or should  
15 have known that images of the surgery existed. So --

16 MR. PANEK: Those are not --

17 THE COURT: Stop, stop.

18 MR. PANEK: Those are not those though documents.

19 THE COURT: Hold on. Go ahead.

20 MS. GOYKADOSH: So I'm not really understanding why  
21 they are saying that they learned about this for the first time  
22 in January, because these medical records, which are  
23 plaintiff's own medical records, show that there were clearly  
24 some interoperative photos taken.

25 MR. PANEK: Those medical records were received in

## Cortes v. City of New York

1 response to them saying they wanted certified records from  
2 every provider. Those are Dr. Senevirante's records. We got  
3 records from his office initially, and when they wanted  
4 certified records I went to the surgical care center where he  
5 was also seen and obtained those certified records for the  
6 first time, in an overabundance of caution, to make sure I had  
7 everything, and that's when those came up.

8 Those were discovered last week. I'm not seeking to  
9 admit those. Those they had since January, and they chose to  
10 ignore during expert discovery.

11 THE COURT: Yes. I opened up expert discovery. They  
12 relied on them as part of the discovery. I opened it up. I  
13 can't imagine how I can open it up and then tie their hands  
14 behind their back. I suggest that you provide your expert with  
15 a copy of those today and allow him to review it.

16 The information that is depicted in those photographs  
17 presumably is consistent with the opinion testimony of their  
18 expert and hope, presumably, consistent with the medical  
19 records. So there should be no surprise here. It's not as if  
20 this is trial by ambush with those documents in light of the  
21 expert report and the opinion testimony that was provided to  
22 the defense. All right.

23 Where are we?

24 MS. RYAN: Exhibit 27, Your Honor.

25 THE COURT: Okay.

## Cortes v. City of New York

1 MS. RYAN: This was addressed in our letter that we  
2 filed last week. This appears to be a June appointment for  
3 plaintiff with Dr. Capiola. And as we discussed, it should be  
4 precluded. As Your Honor said, this doesn't have to do with an  
5 expert. I don't know how plaintiff can, in good faith, argue  
6 this is part of expert discovery; and it was just provided to  
7 us maybe six weeks after the appointment, only when we asked  
8 them to provide it to us.

9 THE COURT: Aren't these records consistent with the  
10 plaintiff's ongoing obligation to supplement? I mean, I'm  
11 talking about a June treatment. It couldn't have been provided  
12 during discovery because it hadn't happened yet.

13 MS. RYAN: We understand that, Your Honor. We don't  
14 think it's relevant, first of all, the ongoing treatment.

15 Also, the document is dated June 4. We received it, I  
16 believe, middle to end of July and only in response to our  
17 multiple e-mails asking for a copy of it. So plaintiff, yes,  
18 he did supplement, but only at our insistence.

19 And also, it doesn't go to expert discovery. It  
20 should be out.

21 THE COURT: Right, but in the normal course you do  
22 have a supplementing of discovery with records and information  
23 that comes in later; and, indeed, the plaintiff has an  
24 obligation to supplement.

25 So this is not an expert issue; you are right. It is

## Cortes v. City of New York

1 about supplementing discovery properly under the rules. Why  
2 should I not construe in that way?

3 MS. RYAN: One moment, Your Honor.

4 (Pause.)

5 MS. RYAN: Your Honor, we will concede on this.

6 THE COURT: Okay. Good. 28. Oh, this is where we  
7 are at?

8 MS. RYAN: Yes.

9 THE COURT: These all say expert reports.

10 MS. RYAN: 28 through 53 can all be grouped together.  
11 These are, our understanding is, transcripts or reports for the  
12 impeachment of our expert, Dr. Sherry.

13 THE COURT: I see.

14 MS. RYAN: We have asked for copies of these.  
15 Plaintiff has told us he does not believe the rules require  
16 that he give us a copy at any point in time. We disagree. We  
17 addressed this in our letter to Your Honor last week.

18 THE COURT: Give them. You have a copy?

19 MR. PANEK: It's several hundred, if not several  
20 thousand pages of transcripts. This is an expert who is --

21 THE COURT: I'm curious. How are you going to impeach  
22 their expert here, who is opining on the facts here in terms of  
23 the causation of this particular plaintiff with other -- wait a  
24 minute -- with testimony from another case?

25 MR. PANEK: Dr. Sherry has said a lot of things over

## Cortes v. City of New York

1 the year about a lot of injuries, including shoulders. He has  
2 been circulating the defendant's hired expert regular circle  
3 for a very long time. There are things he might say at trial  
4 that are inconsistent with things he said in the past about  
5 injury causation, anatomy, what his expertise actually is,  
6 whether or not he actually does surgeries, things like that,  
7 that are contained within those records.

8 I'm not seeking to affirmatively put anything into  
9 evidence, but if he says something that's inconsistent with how  
10 he has testified in the past under oath, I'm certainly --

11 THE COURT: You have digested thousands of pages such  
12 that you can, on a dime, be able to -- because we are not going  
13 to the library in the middle of trial.

14 MR. PANEK: Oh, no. I will have everything dialed in  
15 and prepared so that there is no delay once Dr. Sherry takes  
16 the stand. I just, in an overabundance of caution.

17 THE COURT: So then you should be able to give that to  
18 them.

19 MR. PANEK: Well, I haven't digested that universe  
20 yet.

21 THE COURT: When are you going to do that?

22 MR. PANEK: Prior to him taking the stand.

23 THE COURT: Go ahead.

24 MR. PANEK: It's in pretrial preparations. I'm  
25 preparing for a number of witnesses, a number of medical



Cortes v. City of New York

1 witnesses.

2           These are materials that I will digest prior to  
3 Dr. Sherry taking the stand, and I don't know if he is going to  
4 get up there and say something that's inconsistent with what he  
5 said in the past or how often he does this or how many of these  
6 exams he does a year or how many of these reports he does a  
7 year. So it's almost impossible for me to anticipate what I'm  
8 going to use. It's on me. It's incumbent on me to have a  
9 catalog knowledge of where to go in the transcripts, should he  
10 deviate from previous testimony.

11           But being asked to telegraph that to them is  
12 prejudicial.

13           THE COURT: I don't think they are asking you to  
14 telegraph it. I think they are asking you for a copy of the  
15 transcripts.

16           MS. RYAN: Your Honor, we also have a right to digest  
17 this material, because the proposed impeachment of Dr. Sherry  
18 might be improper. If it's thousands of pages, we should also  
19 have a right to look at the full records of potential  
20 impeachment so that there is no delay, and we can argue to the  
21 court maybe the facts don't match in this case.

22           THE COURT: I promise you, there will be no  
23 impeachment unless you have a copy of what was being used, and  
24 me, because I happen to be a stickler on impeachment. I hate  
25 improper impeachment. It's just one of my -- a thing that is a

MICHELE NARDONE, CSR -- Official Court Reporter

## Cortes v. City of New York

1 pet peeve of mine.

2 So I promise you, that's not going to happen, where  
3 you guys are sitting here, not able to assess the information  
4 that is being used as the basis for impeachment. I'm trying to  
5 figure out where we are with what it is.

6 MS. RYAN: Your Honor, the time limit we are being  
7 told is before he takes the stand. If it is thousands of  
8 pages, we should already have it by now. We need time to also  
9 review it and catalog it. I mean, if he is not going to use  
10 everything on the JPTO, things should be withdrawn and pared  
11 down, but that needs to happen as soon as possible.

12 THE COURT: I agree.

13 MS. RYAN: That's our objection, Your Honor.

14 MR. PANEK: I can assure you, Your Honor, everything  
15 with respect to preparation for this trial has been happening  
16 as soon as possible. I have been preparing at every turn,  
17 getting them every certification. The onslaught of e-mails  
18 that we have received in the last two weeks --

19 THE COURT: That's neither here nor there. Trial is  
20 tough. Right.

21 The question is we are talking about tests. We are  
22 talking about transcripts. We are talking about transcripts  
23 that you have. Presumably, I mean, this is 2019. Thousands of  
24 pages is, you know, I don't know, don't you just put it on a  
25 disk or something like that? It's not like you have to make

## Cortes v. City of New York

1 copies in boxes anymore.

2 MR. PANEK: Okay. So inasmuch as that's Your Honor's  
3 wish here, I will take everything, I will create a Dropbox and  
4 give them a link to it and they can sort it themselves and be  
5 prepared.

6 THE COURT: You will give it to them as it is  
7 organized here. That's how you will give it to them.

8 MR. PANEK: Yes, yes.

9 MS. RYAN: Your Honor, can we get a court-ordered  
10 deadline for that?

11 THE COURT: Yes. You can do it today.

12 MR. PANEK: Sure, Your Honor.

13 THE COURT: There we go.

14 MS. RYAN: Thank you, Your Honor.

15 THE COURT: All right. That takes us to 53.

16 Please make sure that it is organized in that Dropbox  
17 by exhibit number.

18 MR. PANEK: Sure.

19 THE COURT: All right.

20 MS. GOYKADOSH: Your Honor, if I just may, in terms of  
21 organization, we have been given things as like big files of  
22 200 pages with the exhibits inside that.

23 I would respectfully request that each exhibit be a  
24 separate file. Just it is very voluminous, and I do not want  
25 to waste resources trying to like make a file into smaller

## Cortes v. City of New York

1 files.

2 MR. PANEK: Not a problem, judge. They are already  
3 cataloged. I will just note when they provided us documents  
4 they provided us one big file as well.

5 MS. GOYKADOSH: It was 43 pages.

6 MR. PANEK: It was one file.

7 MS. GOYKADOSH: Okay.

8 THE COURT: Fair enough. Okay.

9 Yes, I would suggest that in the future if you are  
10 going to make a request that you should follow the same  
11 practices and protocols that you said is not a problem. You  
12 will fix it. Okay.

13 Here we go. The arrest report. Is this the same  
14 arrest report? How is this different than the arrest report  
15 that's on plaintiff's exhibit list and Defense Exhibit A?

16 MS. RYAN: It's not, until plaintiff changed it to the  
17 handwritten copy.

18 THE COURT: So, I guess, my question is why is  
19 plaintiff objecting to it?

20 MR. PANEK: No. There are necessary redactions to be  
21 made, based on the court's prior rulings, the narratives of the  
22 complaint.

23 THE COURT: No. Maybe I'm misreading it. I see  
24 arrest report, and then I see plaintiff's objection, hearsay,  
25 prejudicial, and relevance.

## Cortes v. City of New York

1 MR. PANEK: Yes. So there are --

2 THE COURT: Arrest report, you are saying they didn't  
3 redact the portions -- can you guys just agree on the arrest  
4 report document?

5 MR. PANEK: Your Honor, the narrative of the arrest  
6 report is the hearsay that the court already precluded.

7 THE COURT: Okay.

8 MR. PANEK: When they sent it to me, they took half of  
9 the hearsay and redacted it and left half of the hearsay in.

10 MS. GOYKADOSH: Your Honor, I can respond to that  
11 because I did the redactions. So the only portion we left in  
12 was defendant -- the complaining witness told the officer that  
13 the defendant was intoxicated.

14 The reason why we left that in was not for the truth  
15 of the matter. We left it in because that is where Officer  
16 Smith recorded that plaintiff was intoxicated. So, to the  
17 extent that he is going to be cross examined about --

18 THE COURT: No. It's out.

19 MS. GOYKADOSH: Okay.

20 THE COURT: Okay. Complaint report, July 1st, 2013.  
21 What's this?

22 MR. PANEK: This is the same issue, Your Honor, where  
23 they are seeking to get in the victim states that Mr. Cortes  
24 was intoxicated, same hearsay and redaction issues.

25 MS. GOYKADOSH: Your Honor, we will certainly make

## Cortes v. City of New York

1 sure that all of the exhibits going forward do not have that.

2 MR. PANEK: Your Honor, I just want to address a  
3 concern. When we discussed this and conferred about it prior,  
4 counsel indicated to me that the reason they were having it  
5 there is because Officer Smith, in his report, in his  
6 observations, states that Mr. Cortes is apparently normal, when  
7 he has the option to check that he is intoxicated, he has the  
8 option to check that he is injured; and he declines to do so in  
9 his paperwork.

10 They indicated that if that question is asked of him,  
11 what was your observation, what did you put down, did you  
12 record he was intoxicated in his report, he is going to say  
13 that this hearsay demonstrates that I thought he was  
14 intoxicated; and he is going to volunteer and back door in the  
15 hearsay narrative, and that's why they left it. So that's my  
16 concern. I would like a ruling that Officer Smith can't do  
17 that.

18 THE COURT: Officer Smith's observations and  
19 appreciation of the plaintiff's state is obviously different  
20 than what was reported by the complainant.

21 MS. GOYKADOSH: So, just to be clear, Officer Smith  
22 did observe plaintiff with alcohol on his breathe and glassy  
23 eyes. He did observe him to be intoxicated. The only place  
24 where it's reported in the paperwork, it says that the witness  
25 told Officer Smith.

## Cortes v. City of New York

1 THE COURT: That's not a recording of his observation.

2 MS. GOYKADOSH: I understand, Your Honor, but --

3 THE COURT: So.

4 MS. GOYKADOSH: So I just want to be clear because I  
5 want to be sure I don't violate any of your rulings.

6 THE COURT: Good.

7 MS. GOYKADOSH: So I understand that he, Officer  
8 Smith, cannot testify that the complaining witness told Officer  
9 Smith that plaintiff was intoxicated. That is out. I get  
10 that.

11 What I want to be sure that Officer Smith can testify  
12 to is that when he interacted with plaintiff he personally  
13 smelled the alcohol on his breath and saw his glassy eyes.  
14 That is not recorded in the paperwork.

15 THE COURT: I don't know why he wouldn't be able to  
16 be, and be ripe for cross.

17 MR. PANEK: Of course. I will reinstate that.

18 THE COURT: We are all --

19 MS. GOYKADOSH: Thank you, Your Honor.

20 MR. PANEK: If I say, why didn't you record that in  
21 your paperwork, he can't say, well, I recorded it through the  
22 hearsay of a witness, which is what they told me they intend to  
23 do.

24 MS. GOYKADOSH: I now understand the court's ruling,  
25 and it will happen.

## Cortes v. City of New York

1 THE COURT: Perfect. Okay, good.

2 Handwritten aided report.

3 MR. PANEK: Again, Your Honor, this is -- this report  
4 contains the narrative.

5 THE COURT: They are going to address -- the defense  
6 has already indicated that they are going to --

7 MR. PANEK: Right.

8 THE COURT: -- revise these, consistent with my  
9 rulings.

10 MR. PANEK: Your Honor, with respect to the document,  
11 there is nothing of any value to the document. So we object to  
12 it coming in on relevance grounds now altogether. There is  
13 nothing to glean from this.

14 THE COURT: Can I see it?

15 MR. PANEK: Sure. The highlights are just mine, Your  
16 Honor.

17 MS. GOYKADOSH: Your Honor, just to make things  
18 easier, we can withdraw that exhibit.

19 THE COURT: Good. We addressed the SPRINT report  
20 already, correct? It's out.

21 MR. PANEK: Yes.

22 THE COURT: The ambulance call report, that's from the  
23 precinct. There is no objection?

24 MR. PANEK: No objection.

25 THE COURT: The academy photograph of Sergeant Musa?



## Cortes v. City of New York

1 MR. PANEK: This was already precluded by Your Honor.

2 THE COURT: Oh, okay.

3 MS. GOYKADOSH: Your Honor, I have a concern with  
4 regards to the photo. I understand that it's precluded by the  
5 court, but, to the extent that plaintiff testifies about how  
6 Sergeant Musa appeared in 2013, would we be allowed to offer a  
7 photo as rebuttal?

8 THE COURT: Okay. I'm so confused. Why does the way  
9 this officer looked matter?

10 MS. GOYKADOSH: Because plaintiff describes this  
11 officer as dark haired and not young looking.

12 THE COURT: Dark haired and not young looking?

13 MS. GOYKADOSH: Correct.

14 THE COURT: That sounds like me. Okay. So I don't  
15 know what that even means to anybody.

16 MS. RYAN: Your Honor, this trial, I think, is  
17 actually about two things. It's about the causation of the  
18 injury and who actually did it. It's our contention that if an  
19 officer did what plaintiff claims, it was not Sergeant Musa.  
20 So plaintiff's description of the officer who allegedly  
21 assaulted him is relevant, and, to the extent he tries to say  
22 that that is what Officer Musa looked like in 2013, it's our  
23 contention we should be able to put forward a contemporaneous  
24 photo of him because it was six years ago, to say no, this is  
25 what he looked like at the time.

## Cortes v. City of New York

1 THE COURT: Dark haired and not young looking, because  
2 you believe in 2013 -- let's assume his hair hasn't changed.  
3 He actually did look young.

4 MS. RYAN: He was 27, Your Honor, and, yes, he was  
5 very young looking.

6 MR. PANEK: So I think Mr. Cortes stated that he  
7 looked to be mid-30s versus 27. This is a photograph from the  
8 academy with a shaved head from --

9 THE COURT: That's not -- yeah, but the academy isn't  
10 2013 anyway. Right?

11 MR. PANEK: Your Honor, he has dark brown hair.

12 MS. GOYKADOSH: So what I'm asking, Your Honor, is if  
13 we would be able to introduce a photo from that time, from  
14 2013, that shows how he looked, just for the purposes of  
15 rebuttal. We are not trying to use it as affirmative evidence,  
16 but if plaintiff does say something like that we should be able  
17 to show the jury what he did look like.

18 THE COURT: How are they going to know what time  
19 period that photograph came from?

20 MS. GOYKADOSH: Well, the photographs have, I believe,  
21 like metadata stored. So we can use this to show what date it  
22 has.

23 MR. PANEK: Your Honor, we would request all the --  
24 nothing has been provided in discovery, by the way, and we  
25 demanded photographs as well. So we are now reopening

## Cortes v. City of New York

1 discovery on photographs from 2013 that we haven't been  
2 provided with, that aren't listed on the JPTO at all. So in  
3 the first instance, they are excluded from the universe of  
4 things we can discuss at trial.

5 If we would be permitted to conduct discovery and  
6 question Sergeant Musa about these photographs and have a  
7 deposition of him. When were these photographs taken? Did you  
8 change your haircut? Did you dye your hair? Did you get sun  
9 and your hair lighten up in the sun? All those sorts of  
10 things. But for them to say ah-ha, here is the photograph, it  
11 doesn't look like him.

12 THE COURT: Yes, we are not doing the photograph.

13 Criminal court file?

14 MR. PANEK: We think, Your Honor, based on the court's  
15 ruling, I mean, there are some, I suppose, arraignment  
16 documents that show timing that he was there; but, in terms of  
17 the majority of this document, it should be excluded. The fact  
18 that a protective order was issued is irrelevant in this case.  
19 That's in there.

20 THE COURT: What's the relevance of this document?

21 MS. JACOBS: Your Honor, again, this is just potential  
22 impeachment material. I don't believe -- we are not offering  
23 it for --

24 THE COURT: Right. So why don't we cross the  
25 impeachment bridge when we get to it. Everybody knows

## Cortes v. City of New York

1 impeachment is my pet peeve. So I suspect everyone will tread  
2 lightly. All right.

3 MS. GOYKADOSH: Your Honor, one more concern about the  
4 JPTO -- I'm sorry -- the video depositions. So plaintiff --

5 THE COURT: Is this deposition designations?

6 MS. GOYKADOSH: Yes. I'm sorry. Deposition  
7 designation.

8 THE COURT: I skipped over those, didn't I?

9 MS. GOYKADOSH: I don't believe it was on the new  
10 JPTO. I believe on the new JPTO there was only the exhibits  
11 and the witnesses.

12 THE COURT: Okay.

13 MS. GOYKADOSH: So, my understanding, on the JPTO  
14 plaintiff initially designated Sergeant Musa's entire video  
15 deposition. Last night we received specific portions of the  
16 video deposition that plaintiff apparently intends to play.

17 We have no objection to the video deposition being  
18 used for impeachment. However, to the extent that plaintiff  
19 wants to use Sergeant Musa's video testimony as part of his  
20 case in chief somehow, there is a preference in this circuit  
21 for live testimony.

22 THE COURT: But don't the rules specifically  
23 contemplate the use of deposition testimony of a party for any  
24 reason?

25 MS. GOYKADOSH: For Rule 32 it does, but, again, there

## Cortes v. City of New York

1 is a preference in the circuit. I believe that the words that  
2 are used is that it's a well-established and sensible  
3 preference; and the case name is Tardif versus City of New York  
4 344 F.Supp. 3d 579, SDNY 2018.

5 THE COURT: That's SDNY. What about the circuit?

6 MS. GOYKADOSH: So in the circuit there is a Learned  
7 Hand case from 1939, which has been cited to by many courts.  
8 It's called Napier versus Bossard, N-A-P-I-E-R versus  
9 B-O-S-S-A-R-D, 102 F.2d 467, and it says that the deposition  
10 has always been and still is treated as a substitute, a second  
11 best, not to be used when the original is at hand. So the  
12 facts in that case were slightly different.

13 THE COURT: Was it a party?

14 MS. GOYKADOSH: No, it was not a party.

15 THE COURT: Right.

16 MS. GOYKADOSH: But again, Sergeant Musa will be here.

17 THE COURT: I get it, but I just don't know how I get  
18 around -- because, quite frankly, as a practitioner, I took  
19 your view. I hated it, right; but I couldn't then, nor can I  
20 in my mind now, figure out how to get around the words of the  
21 rules, which provide for the use of the deposition of a party  
22 for any reason.

23 MS. GOYKADOSH: I think the case law does indicate  
24 that the more sensible approach is to allow the witness to  
25 testify.

## Cortes v. City of New York

1 THE COURT: I get it, but there is some reason why the  
2 rules provide for a different treatment of a party than it does  
3 for other individuals; and I haven't quite figured out the  
4 logic, but it's there. I do prefer live testimony. It's my  
5 opinion, for what it's worth, and so do juries.

6 MR. HARVIS: A couple of things, Your Honor. First of  
7 all, to clarify the record, it does appear in the designation  
8 of Musa's deposition. It does appear on page 9 of the current  
9 JPTO.

10 THE COURT: It does.

11 MR. HARVIS: We specifically identify the ranges.  
12 It's a total of about 13 minutes of video. So we are not  
13 talking about a lot.

14 I also just want to say in this district Judge  
15 Weinstein, in the NAACP versus AA Arms Inc. case -- let me slow  
16 down -- 99 CV 3999, allowed it; and Judge Gleeson, in a trial  
17 that I lost when I worked at Corporation Counsel admitted it  
18 also, and that's Robertson v. Sullivan, 07 CV 1416. It's  
19 regularly done when it's a party. We are only talking about a  
20 party. So that's our argument.

21 THE COURT: So you all will be able to use this  
22 testimony. I ask that you limit it to what you have identified  
23 so we don't end up going beyond, and also just because I think  
24 everybody prefers live testimony.

25 MS. JACOBS: Your Honor, understood. I reviewed it

## Cortes v. City of New York

1 briefly. I think we may have some objections, separate  
2 objections, to that. We have not discussed that yet. So we  
3 will try and work it out between the parties.

4 THE COURT: Good. I'm assuming some of those  
5 objections were made during the testimony itself.

6 MS. JACOBS: I think the majority of them are  
7 objections that were made during the testimony. There were a  
8 few pieces that that, having done a brief review, may be  
9 misleading or incomplete. So we can either work that out or  
10 perhaps add in our own designations, if necessary.

11 THE COURT: A counter designation?

12 MS. JACOBS: Yes.

13 THE COURT: Okay. All right. Is it possible that we  
14 have done everything?

15 MS. RYAN: There are a few remaining housekeeping  
16 issues, I think, from the letter.

17 THE COURT: Okay. This is the joint letter?

18 MS. RYAN: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. HARVIS: Docket entry 88, Your Honor.

21 THE COURT: Yes, I have it. August 2. Okay.

22 With respect to Spanish-speaking jurors, it is my  
23 practice during voir dire to ask all jurors if they speak  
24 another language, and then I will ask them what that language  
25 is. At the time that I give the charge to the jury, there will

## Cortes v. City of New York

1 be a charge given to all jurors concerning the testimony that  
2 came in through the use of an interpreter and that they must  
3 rely on the interpreter. That is standard. It will not be  
4 done by singling out any particular juror, but to give the  
5 charge more generally.

6 You are going to go to your toolbox about this expert.

7 MR. PANEK: Yes, Your Honor.

8 THE COURT: We talked about the medical records. We  
9 talked about the impeachment exhibits.

10 Alternate theories of causation. In an effort to  
11 prepare for this conference today, I went back and read the  
12 transcript from the last conference, and my concern then was  
13 that the alternate theories of causation were going to be based  
14 on pure speculation. I'm assuming that you all have an expert  
15 that has an alternate theory of causation and you have the  
16 evidence that you know you are going to put on. Right?

17 MS. GOYKADOSH: Yes, Your Honor.

18 MR. PANEK: Yes, Your Honor. However, the expert  
19 report of Dr. Sherry does not allow them a causation theory of  
20 a slap or a punch or a fight being responsible for the injury.  
21 So I ask that that still be precluded from opening statements.

22 THE COURT: What does your expert say was the  
23 potential cause?

24 MS. GOYKADOSH: So the expert says that a person who  
25 is handcuffed behind his back and pushed against a wall would



## Cortes v. City of New York

1 not sustain a rotator cuff tear. So he didn't speculate as to  
2 what the cause might be, but he did say that -- he is going to  
3 be testifying.

4 THE COURT: Then that's what you can say. You can't  
5 say that it potentially was caused by the slap or throwing  
6 bottles, but you can say you will hear testimony from an expert  
7 that will say that being handcuffed and being thrown against  
8 the bars cannot cause this injury.

9 MS. GOYKADOSH: I understand, Your Honor; but, just to  
10 be clear, we can talk about the facts leading up to this  
11 incident, for instance, the open-handed slap.

12 THE COURT: You can say that it happened. You cannot  
13 offer to the jury that it is an alternate theory for causation,  
14 yes.

15 MR. PANEK: They can say there is an allegations of an  
16 open-handed slap.

17 THE COURT: Yes. We have the language. Forgive me.

18 MR. PANEK: Yes.

19 THE COURT: Whatever we agreed to.

20 MS. GOYKADOSH: Yes, Your Honor.

21 THE COURT: Okay. Now are we done?

22 MR. HARVIS: I believe so.

23 MR. PANEK: Yes, Your Honor.

24 THE COURT: We did this in exactly the amount of time  
25 that we had set out. I am proud of all of us.

## Cortes v. City of New York

1 All right, folks. So, let's see, I want us to make  
2 sure we get started as quickly as possible, in terms of the  
3 voir dire of the jury. So let's make sure.

4 You all should be here at 8:45 so that we can -- I can  
5 get here, and we can get on the bench by 9:00. You guys can  
6 resolve any technical issues, hopefully, in that 15-minute  
7 period. If not, if you need 30 minutes, then let me know, and  
8 it will be 8:30.

9 And then we will talk about whatever issues we may  
10 have, and then we will bring the jury up at 9:30. But there  
11 should only be a few lingering issues. It shouldn't take much.

12 I will have a proposed charge to you by Friday. We  
13 will have a charging conference -- not on Monday at end of day  
14 because Monday is already -- we are going to go to 5 o'clock in  
15 hopes to get everybody in. So we will do the charging  
16 conference likely on Tuesday morning. But you will let me know  
17 on Monday at the end of the day how involved you guys expect  
18 this charging conference to be. Telegraph for me whether there  
19 is going to be a lot to discuss or not.

20 MR. PANEK: It should be pretty straightforward.

21 THE COURT: There is only one cause of action.

22 MR. PANEK: Right, only one cause of action, and the  
23 question of punitives. That's really it.

24 MS. GOYKADOSH: Your Honor, just one question with  
25 regards to the opening. I just want to make sure that there is

## Cortes v. City of New York

1 not going to be any exhibits or multimedia used during opening.

2 THE COURT: Demonstratives?

3 MS. GOYKADOSH: Demonstratives or anything.

4 THE COURT: Not that I have anticipated, and no one  
5 has suggested to me whether there would be.

6 MR. PANEK: Typically parties would discuss that and  
7 stipulate. We haven't discussed it yet. So if that's your  
8 indication, that you don't want that, then I suppose we are not  
9 going to reach an agreement. So what I think doesn't matter.

10 THE COURT: I don't know. Maybe they like your  
11 illustrations. They haven't shown them to their doctor. Who  
12 knows? Maybe they will like them.

13 MR. PANEK: Are you talking about everything or just  
14 the demonstratives?

15 MS. GOYKADOSH: I mean, we can certainly confer.

16 THE COURT: Why don't you all talk about it.

17 MR. PANEK: Yes. The last lingering concern is, is  
18 there a time, whether it be now after the conference or at  
19 another time, where it's convenient for plaintiff to just have  
20 15 minutes to get familiar with the technology in the  
21 courtroom, so we don't have to do that in front of the jury and  
22 waste time during the trial? Just to put our hardware to the  
23 hardware to see how it works.

24 THE COURT: I would like for that to happen Monday  
25 morning. So maybe do you want to come in at 8:30 on Monday?

## Cortes v. City of New York

1 MR. PANEK: Sure. That's fine.

2 MR. HARVIS: That's perfect.

3 THE COURT: All right. You all come in at 8:30 on  
4 Monday morning, and my deputy will be able to assist you.

5 MR. PANEK: Sure.

6 THE COURT: I think 30 minutes should be enough time.  
7 I'm looking forward to it.

8 I have to tell you, I really appreciate how prepared  
9 both of you all were for this pretrial conference. I really  
10 did. It helped me in making my determinations. You were  
11 prepared with both law and argument, and it was much  
12 appreciated.

13 MR. PANEK: If I can pay my adversaries a compliment  
14 now. I would say the onslaught, as I said, of e-mails  
15 facilitated that. So the credit is due to them as well, judge.

16 THE COURT: Good. Thank you all. All right. I will  
17 see you all on Monday.

18 MR. PANEK: Thank you, Your Honor.

19 MS. JACOBS: Thank you, Your Honor.

20 (End of proceedings.)

21 o o o

22 Certified to be a true and accurate transcript.  
23 /s/ Michele Nardone  
MICHELE NARDONE, CSR -- Official Court Reporter

24

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MICHELE NARDONE, CSR -- Official Court Reporter